Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

JAMES E. AKIN, ET AL.

Petitioners,

vs.

ASHLAND CHEMICAL COMPANY, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. IKARD
211 N. Robinson,
Suite 600
Oklahoma City,
Oklahoma 73102
(405) 239-7046
Counsel of Record

E. HART GREEN
MITCHELL A. TOUPS
WELLER, GREEN,
MCGOWN & TOUPS
2615 Calder, Suite 400
Beaumont, TX 77702
(409) 838-0101

SHARI A. WRIGHT
ROBERT J. BINSTOCK
REICH & BINSTOCK
4625 San Felipe, Suite 1000
Houston, TX 77027
(713) 622-7271

Attorneys for Petitioners

638P

QUESTIONS PRESENTED

Assuming the initial pleading alone does not give a party "unequivocal notice" of the removability of the case, does the thirty-day time limit for removing a case to federal court under 28 U.S.C. § 1446(b) nevertheless begin to run if the removing party has specific knowledge of its own activities that makes the case removable?

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Petitioners respectfully pray that based upon significant questions as to the construction and application of a federal removal statute, 28 U.S.C. § 1446(b), stated in the Questions Presented herein, this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

OPINIONS BELOW

The Order of the United Stated Court of Appeals for the Tenth Circuit affirming the United States District Courts for the Western District of Oklahoma and the Eastern District of Texas was reported as *Akin v. Ashland Chemical* at 156 F.3d 1030 (10th Cir. 1998) (App. A-1-A-23).

The opinion of the United States District Court for the Eastern District of Texas on removal was reported as *Akin v. Big Three Industries, Inc.* at 851 F.Supp. 819 (E.D. Tx 1994) (App. A-29-A-48).

STATEMENT OF JURISDICTION

The Order of the United Stated Court of Appeals for the Tenth Circuit affirming the United States District Courts for the Western District of Oklahoma and the Eastern District of Texas was issued on August 31, 1998. The court of appeals had jurisdiction

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[1] The court recently granted certiorari in *Murphy Bros. v. Michetti Pipe Stringing*, No. 97-1909, to determine whether the 30 day limit for removal under 28 U.S.C. § 1446(b) started to run when the defendant received a faxed, stamped copy of the Complaint or when the complaint was formally served. 67 U.S.L.W. 3291, November 3, 1998).

pursuant to 28 U.S.C. § 1291.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1446 provides:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, a copy of an amended pleading, motion, order, or other paper from which it may be first ascertained that the case is one which is or has become removable, except the case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after the commencement of this action.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States and division embracing the place where it is pending.

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official capacity for any act under color of such account or on account of any right, title or authority claimed under any Act of Congress for the apprehension of criminals or the collection of the

revenue.

STATEMENT OF THE CASE

The fundamental question presented by this case is whether the thirty day time limit within which to remove a case from state court to federal court begins to run when the defendant has specific knowledge of the removability of the case even if the initial pleading does not give the removing party "unequivocal notice" of its removability?

PROCEDURAL BACKGROUND AND THE PLEADINGS

This case was originally filed in the District Court of Jefferson County, Texas, on November 13, 1992, on behalf of 126 plaintiffs against twelve engine manufacturers and chemical suppliers, including General Electric Company ("GE").[2] On December 28, 1992, GE actually received the Petition. On June 16, 1993, the co-defendant Chemical Specialist & Development, Inc., ("Chemical Specialist") filed a Motion for Summary Judgment asserting a government contractor defense to plaintiffs' claims. On

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[2] All of the plaintiffs were civilians employed by the United States Air Force ("AF") at Tinker Air Force Base ("TAFB") and alleged in product liability claims that both the jet engines and parts manufactured by GE and the chemicals manufactured by the defendants and sold to the AF to be used to clean the engines prior to reworking were defectively "designed, formulated, manufactured and marketed", that the products breached warranties of fitness, and that the defendants failed to warn of the dangerous nature of their products.

August 19, 1993, GE filed a Notice of Removal in the United States District Court for the Eastern District of Texas, on the basis that the federal court had federal enclave jurisdiction under 28 U.S.C. § 1331 and that under 28 U.S.C. § 1442(a)(1) GE was a person acting under the authority of the Secretary of the Air Force.

Plaintiffs timely filed a Motion to Remand the case back to state court asserting that no federal enclave jurisdiction was present, that federal officer jurisdiction was absent and that removal was untimely. The defendants objected to the remand and sought transfer of venue to the Western District of Oklahoma. Plaintiffs replied to the objection, asserting that GE also lacked the necessary unanimous consent of its co-defendants. The court conducted a hearing on remand on December 6, 1993.

On February 23, 1994, GE filed a Motion for Leave to file a Third Party Complaint alleging that United States civilian and military personnel were negligent in "failing to exercise reasonable care, skill and faithfulness in following and complying with the maintenance and repair instructions and safety information GE and others provided", negligently failing to "exercise reasonable care, skill and faithfulness in assuring that GE products were handled in a safe and nonhazardous manner" and "negligently failing to implement an appropriate health and safety program."

On March 21, 1994, the Honorable Howell Cobb denied plaintiffs' Motion to Remand and granted the defendants' Motion to Transfer Venue to the Western District of Oklahoma. (reported at 851 F.Supp. 819, App. A-1-A-23) and accordingly issued an order. (App. A-24-A-26). Plaintiffs filed a Motion to Reconsider which was denied and the case was transferred to the Western District of Oklahoma. (App. A-27-A-28).

In the Oklahoma court plaintiffs timely filed a Motion for Remand and Brief on June 29, 1997, again asserting that remand was untimely, that the removing defendants failed to get unanimous consent because of the Motion for Summary Judgment filed by their co-defendant, and that the court lacked jurisdiction under either federal enclave or federal officer grounds. The court denied the Motion to Remand. (App. A-29-A-31).[3]

After transfer, plaintiffs alleged that the defendants failed to warn the AF of the dangers of neurological injury arising from chronic, long-term, low-level exposure to the solvents manufactured and sold by those defendants and that these defendants had reason to know that the AF did not recognize and would not discover this specific hazard.

After all but four of the defendants were either dismissed or settled out, the solvent defendants moved for summary judgment. On December 13, 1996, the court in the Western District of Oklahoma sustained the Motion for Summary Judgment of the remaining defendants, now Respondents, on the grounds that TAFB was a knowledgeable, sophisticated purchaser and that defendants had no duty to warn the AF of hazards that it knew, both general and

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[3] Once in the Oklahoma court, plaintiffs restated their objection to removal **and** jurisdiction in both the Fourth and Fifth Amended Original Complaints:

> The court has determined that there is jurisdiction for this cause of action. However, Plaintiffs disagree and contest jurisdiction of this Court and again request that the case be remanded to the 60th Judicial District Court, Beaumont, Jefferson County, Texas.

specific.

On appeal, the Tenth Circuit Court of Appeals affirmed summary judgment and also affirmed removal, but failed to specifically address the issue of G.E.'s **knowledge** in its analysis of the removal issues. Instead, the court rejected any duty of the defendants to "**investigate**" whether the case is removable. (App. A-38 n.2).[4]

FACTUAL BACKGROUND ON REMOVAL ISSUE

Since the courts below found the Petition to be ambiguous[5] and the answers to Interrogatories to be dispositive as to timeliness, the key facts bearing on GE's knowledge of the removability of the Texas state Petition include, obviously, the contents of the Original Petition and the Interrogatories GE propounded, and matters outside the state pleadings which include an employee affidavit submitted by

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[4] It is beyond dispute that GE knew **at the time** the Petition was filed that its engines which were manufactured for the Air Force were reworked and repaired by the plaintiff civilian workers at (e.g. within the confines of) TAFB-GE was not required to "inquire" of or research the status, activities or conduct of any opposition or third party.

[5] The Circuit Court agreed with the Texas court that found the Petition's language "at Tinker Air Force Base" in the phrase "while working for the United States" could be either a "geographical modifier, referring to the location of the exposures" or a "durational modifier, describing the time period during which the exposures occurred" and therefore was ambiguous. (App. A-16). The Circuit Court found the Petition to be ambiguous "in that it did not provide unequivocal notice of the right to remove". (App. A7-A-38).

GE, admissions made by GE's counsel at a hearing conducted by the court, and a Third-Party Complaint filed by GE against the United States.

All of this material, taken together, established that GE's knowledge of its own activities at TAFB resolved any purported ambiguity in the Petition as to either the federal enclave or federal agent jurisdiction.[6]

1. The Original Petition: The original Petition was filed on behalf of numerous plaintiffs against 12 defendants-divided into two groups, engine manufacturers and chemical manufacturers. As to GE (and Pratt & Whitney) the Petition alleged that:

> IV.
>
> . . . Plaintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to **cobalt, chromium, cadmium** . . . while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma. . . . **General Electric Company and Pratt and Whitney Company, Inc. provided jet engines to Tinker Air Force Base which were worked on by the above-referenced Plaintiffs. Each Plaintiff listed above was exposed to the dust and fumes of the jet engine parts. These plaintiffs worked on**

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[6] A somewhat cynical view of GE's belated removal would be that it sat on the sidelines while Chemical Specialists tried to win summary judgment on the government contractor defense-the very same defense raised by GE in federal court. (see App. A-9-A-11 for the district court's discussion of GE's colorable government contractor defense as an element of federal officer jurisdiction).

> **the jet engines by grinding, reworking, and being generally exposed to the chemicals produced by the jet engines and jet engine parts. The jet engines emitted a significant amount of cobalt, chromium, and cadmium during the grinding, reworking and otherwise modification of the engines, which were some of the chemicals responsible for these Plaintiffs' damages.** Plaintiffs were also exposed to numerous other hazardous chemicals while **working at the air force base**. (emphasis added).

The state court Petition also alleged that

"Plaintiffs **have been employed at Tinker Air Force base** and were exposed to significant amounts of chemicals." (emphasis added). It also alleged that defendants were:

> . . . negligent in the manner in which they failed to properly test said chemicals before placing them **in the hands of Tinker Air Force Base**; that they were further negligent in failing to warn and instruct **the individuals working at Tinker Air Force Base**, Plaintiffs herein, of the proper way to cope with said chemicals and/or proper way to protect one's body against said chemicals and/or the toxicity of said chemicals and/or means of preventing health effect caused by those chemicals and **working around the chemicals**. (emphasis added)

The Petition also alleged that:

> . . . Defendants were aware of the latent defects in their chemicals **and jet engines. Therefore, this conscious decision to permit** the chemicals and **jet engines to be used by workers at Tinker Air Force Base** without adequate warnings or

> precautions constitutes a wanton, willful disregard of the rights of the Plaintiffs . . . (emphasis added).

2. Interrogatories: Months before removal the defendants served a detailed set of interrogatories on the plaintiffs which were answered on July 16, 1993. (e.g. James Eugene Aiken, attached as Ex. A to GE's Response to Plaintiffs' Motion to Remand). Virtually every interrogatory relating to damage claims was prefaced with "materials you worked with and around at Tinker Air Force Base". For example, in answer to Interrogatory 12(l)(b) (Describe how you came into contact with such materials?), Aiken responded "By working with them at Tinker."; in answer to Interrogatory 32 concerning job duties, Aiken responded that "all duties were performed on base".

There was no variation in any answer to interrogatory and corresponding allegations in the Petition; to the contrary, the answers echoed the allegations of the Original Petition.

3. Employee Affidavit: In an affidavit by Dempsey L. Hodges, a GE employee stationed at Midwest City, Oklahoma, (where TAFB is located) with duties associated with TAFB, attached to GE's Response to Plaintiffs' Motion to Remand, he stated:

> 2. I have been employed by General Electric Company from 3/16/56 to PRESENT. My current title is Manager, CEAE Midwest City Office.
>
> 3. . . . the jet engines manufactured by General Electric Company **which are repaired or maintained at Tinker**, are for military use and **were manufactured by General Electric Company** pursuant to the specifications from the Department of the Air Force **under a contract with**

> **the Secretary of the Air Force or his delegee**. (emphasis added).

4. Hearing on Motion to Remand: At the hearing the court conducted on the pending Motions on December 6, 1993, the court had a revealing colloquy with GE's counsel concerning the Petition's allegations, and made a specific request for the contract GE had with the AF to make the engines.[7] GE counsel's statements established that GE's own long-standing contract activities triggered federal officer jurisdiction.

5. Third-party Complaint: After the hearing but before the court's decision, GE asserted a claim against the United States alleging that the military and civilian personnel at TAFB were negligent in using the defendants' solvents.

From the interrogatories propounded by GE, the employee affidavit, counsel's statements at the hearing and the Third-Party Complaint, it is clear that GE knew at the time the original petition was served on it in December, 1992, that the case was removable under either the federal enclave or federal agent jurisdiction.

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[7] Counsel admitted that nothing in the Petition indicated that any of the alleged exposures occurred at any place other than within the confines of TAFB and asserted that, as the Hodges affidavit reflects, that all of GE's engines was manufactures and the reworking was done under a contract with the Air Force. Despite a renewed request by the Texas court, from the record this contract was never provided to the Court. Minimally, to meet its burden of establishing the propriety of removal in light of GE's professed position, GE should have so provided the contract to the Court before the Texas court ruled. Arguably, this failure acknowledges that the work on its engines performed by plaintiffs was contractually required to be performed at (within the confines) of TAFB.

STANDARDS APPLICABLE TO REMOVAL

Under 28 U.S.C. § 1441(a), an action brought in state court may be removed by a defendant to a Federal district court if that Federal court would have had original jurisdiction over the action, whether the case could have been originally filed in federal court. *City of Chicago v. Intern. College of Surgeons*, _ U.S. _, 118 S.Ct. 523, 529 (1997), *Rivet v. Regions Bank of LA.*, _ U.S. _, 118 S.Ct. 921, 925 (1998), *De Young v. Lorentz*, 887 F.Supp. 254, 257 (D. Ken. 1995), *Kenro, Inc. v. Fax Daily, Inc.*, 904 F.Supp. 912, 913 (S.D. Ind. 1995), *Cervantes v. Civil Service Com'n*, 99 F.3d 730, 732 (5th Cir. 730), *Barbara v. New York Stock Exchange*, 99 F.3d 49, 53 (2nd Cir. 1996).

Removal is purely statutory and should be construed strictly in favor of state court jurisdiction and against removal. *Frank v. Bear Stearns & Co.*, 128 F.3d 919 (5th Cir. 1998), *Carroll v. United Airlines, Inc.*, 7 F.Supp. 516, (D. N.J. 1998), *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995), cert. den. 116 S.Ct. 174 (1995), *Heckelmann v. Piping Companies, Inc.*, 904 F.Supp. 1257, 1260 (N.D. Okl. 1995), *Barber v. Albertson's, Inc.*, 935 F.Supp. 1188, 1189 (N.D. Okl. 1995) and cases cited therein, *Schlumberger Industries, Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1284 (4th Cir. 1994), *Naef v. Masonite Corp.*, 923 F.Supp. 1504, 1507 (S.D. Ala. 1996), *Rodgers v. Northwestern Mut. Life Ins. Co.*, 939 F.Supp. 1254, 1255 (D. W.Va. 1996), *J.R. Laughead v. Air Dayco Corp.*, 942 F.Supp. 339, 340 (S.D. Tex. 1996), *Kenro, Inc.*, supra, 904 F.Supp. at 913.

In the face of a Motion to Remand, the defendant has the burden of establishing the propriety of removal and this burden extends not only to demonstrating the jurisdictional basis for removal, but also necessary compliance with requirements of the removal statute. *Toumajian v. Frailey*, 135 F.3d 648 (9th Cir. 1998), *Pachecho de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998), *De Young*, supra, 887 F.Supp. at 257, *McCain v. Cahoj*, 794 F.Supp. 1061, f. 1 (D. Ken. 1992), *Laughlin*, supra, 50 F.3d at 873, *J.R. Laughead*, supra, 942 F.Supp. at 340, *Eyal Lior v. Sit*, 913 F.Supp.

868, 874 (D.N.J. 1996), *Westinghouse Electric Corp. v. Newman & Holtzinger*, 992 F.2d 932, 934 (9th Cir. 1993). If there is any doubt that a right to removal exists, ambiguities are to be construed against removal. *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1341 (S.D. Tex. 1995), *Mulcahey v. Columbia Organic Chemicals, Co.*, Inc., 29 F.3d 148, 151 (4th Cir. 1994), *Kenro, Inc.*, supra, 904 F.Supp. at 913, *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.Supp. 535, 537 (E.D. Va. 1995).

A petition for removal must be filed within 30 days of the receipt of the state court initial pleading or within 30 days "from which it may be ascertained" that the case is removable. 28 U.S.C. § 1442(b). Wright, Miller, and Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, Section 3732. (1998 Supp.).

Even if a federal question claim is joined with other nonremovable claims, the entire case is removable. *City of Chicago*, supra, 118 S.Ct. at 529 (federal question plus purely state administrative review); *Weimer v. City of Johnstown*, 931 F.Supp. 985, 988 (N.D. N.Y. 1996).[8]

The failure to timely file a notice of removal requires remand to the state court. *Rothwell v. Durbin*, 872 F.Supp. 880, 881 (D. Kan. 1994), *First Nat. Bank & Trust Co. in Great Bend v. Nicholas*, 768 F.Supp. 788, 790 (D. Kan. 1991),

Because removal implicates concerns of federalism, the combined effect of these various rules is that removal is not favored, should be denied if any doubt exists and the removing party has the

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[8] At the hearing, the Court acknowledged that GE could remove the case on the federal officer basis even if the enclave jurisdiction was in doubt because of a colorable uncertainty as to whether the exposures might have also occurred outside TAFB. "Under the enclave theory, he couldn't remove [if the exposures were not solely on a federal enclave]. Under federal officer he could."

burden of resolving any such doubts. As demonstrated below, the decision of the Circuit Court turns these justifiable rules on their head-the removing party can delay removing the case until it is absolutely certain of the basis of removability ("unequivocal notice") from pleadings in the state case even if its has indisputable knowledge of its own activities that gave it actual knowledge of the removability of the case many months before it filed its notice of removal.

Assuming *arguendo* that the original Petition alone did not provide GE "unequivocal notice" of its removability, where GE knew from its own activities that the Petition was removable, the thirty-day time limit under 28 U.S.C. § 1446(b) should begin to run.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUE PRESENTED BY THIS CASE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE COURT.

As in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, supra, the courts have treated the question of any steps necessary to ascertain the removability of a case in widely disparate fashion.

A long line of cases have addressed the impact of lack of diversity (i.e. citizenship) or jurisdictional amount allegations in an initial state pleading on the timeliness of removal, focusing on what duty, if any, a removing party has to go outside the pleading itself if the pleading is ambiguous as to removability.[9]

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[9] *See* Annot., *When Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court Begins to Run*

A. Cases Requiring Inquiry or Use of Knowledge Starting Removal Clock

One line of cases requires the defendant in a state suit to make inquiry or use the knowledge it has obtained to ascertain the removability of an otherwise "ambiguous" pleading.

For example, in *Kaneshiro v. North American Co. for Life and Health Ins.*, 496 F.Supp. 452, 496 (D.C. Hawaii 1980), the court, applying the removability rules outlined above, found that:

> Where the initial pleading is indeterminate, absent fraud by the plaintiff or pleadings that provide 'no clue' that the case is 'not removable', the burden is on the defendant desiring removal to scrutinize the case and to remove it in a timely fashion.[10]

Interpreting *Kaneshiro* to require that a petition for removal be filed within 30 days of receipt of any initial pleading "which does not on its face preclude removal", the court in *Blow v. Liberty Travel,*

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under 28 U.S.C. § 1446(b), 16 A.L.R.Fed. 287, §§ 11 and 12 (Supp. 1998) and its superceding annotation, Annot, *When Does Period For Filing Petition For Removal Of Civil Action From State Court To Federal Court Begin To Run Under 28 USCS § 1446(b)*, 139 ALR Fed 331, § 8 (1998). These annotations gather cases relating to the effect of the defendant having information apart from the intial pleading on the time for removal and demonstrates that both removing parties and parties resisting removal lack clear guidelines.

[10] *See also* additional cases cited in § 8(b), Annot., supra, 139 ALR Fed 331, 398-403.

Inc., 550 F.Supp. 375, 376 (D.C. Pa. 1982), again placed the burden on the removing party to ascertain the citizenship of plaintiffs that had alleged they were residents of Pennsylvania.

Citing *Kaneshiro*, the court in *Kanter & Eisenberg v. Madison Associates*, 602 F.Supp. 798, 801 (D.C. Ill. 1985), remanded for untimely removal, finding that the removing party failed to take adequate steps to ascertain the existence of diversity.[11] In *Knudsen v. Samuels*, 715 F.Supp. 1505 (D.Kan. 1989) the court held that the defendant's knowledge of its own citizenship required the defendant to commence removal even if the initial pleading alleged defendant's state of citizenship. (*see Keller v. Carr*, 534 F.Supp. 100 (W.D. Ark. 1981 to same effect).

In the somewhat related issue of vague allegations in the state court pleading, in *Scott v. Greiner*, 858 F.Supp. 607, 610, n. 2 (S.D. W.Va. 1994) the court determined that the defendant was able to ascertain federal question jurisdiction sufficiently from the state complaint and could not wait for receipt of admissions even though the state pleading was vague. In *Golke v. Lee Lumber & Bldg. Materials Corp.*, 671 F.Supp. 568,571 (N.D. Ill. 1987), the court found the original petition "fairly stated a colorable claim for retaliatory discharge even though "arguably, inartfully pleaded" and could not say the defendant had "no clue". In *Golden Apple*

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[11] The court rejected the defendant's assertion that the earliest it could have known of the removability of the case was the deposition of one of the plaintiff five months after the state petition was filed. at 799. The court determined that the allegations of the petition provided sufficient information of the residency of the plaintiffs that could have been resolved by a simple phone call to plaintiffs' counsel. at 801.

Management Co., Inc. v. GEAC Computers, Inc., 990 F.Supp. 1364 (M.D. Ala. 1998) the court found a settlement negotiation letter (treated as an "other paper") sufficiently informed the defendant that the thirty day removal period was triggered.

For jurisdictional amount, the removing party has the burden of proving by a preponderance of the evidence that the amount in controversy exceeded $50,000. *Laughlin*, supra, 994 F.2d at 873, *Gafford v. General Electric Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993), *Barber*, supra, 935 F.Supp. at 1190-91.[12]

Similarly concentrating on whether the pleading allows the defendant to "intelligently ascertain removability" are cases determining whether certain state-authorized pleadings or the practice of "courtesy-copy" triggers the thirty day removal period-the issue now pending before the court in *Murphy Bros., Inc*, supra.

B. Cases Limiting Starting of Removal Clock to Pleadings

Another line of cases flatly decline to require the defendant to inquire into grounds for removal (usually, citizenship, amount or federal question) or to charge the defendant with its own knowledge in starting the time limit for removal.

For example, in *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 162-63, reh, en banc, den, 976 F.2d 774 (5th Cir. 1992), cert

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[12] In *Barber*, the court specifically rejected the argument that the removing defendant ought to be able to await the response to a request for admission to establish the amount in controversy. at 1191, n. 3.

den, 507 US 967 (1993), the court declined to consider matters known to the defendant or that the defendant could have known through investigation. Similarly, in *Smith v. Bally's Holiday*, 843 F.Supp. 1451, 1453 (N.D. Ga. 1994) the court restricted the jurisdictional amount issue to the plaintiff's state court pleading. Also, *Pack v. AC & S, Inc.*, 838 F.Supp. 1099, 1101 (D.Md. 1993), a case relied upon by the District Court (App. A-17), held only a paper generated in the state litigation would suffice to start the removal period. In the two annotations above-cited, there are additional cases which interpret § 1442 to be limited to matters within the pleadings.

C. The Importance of the Question Presented

As in the *Murphy Bros.* case now pending before the court[13], this case presents an issue of exceptional importance to litigants and their counsel not previously presented to the Court, in part, because of the procedural roadblocks that exist to the review of many removal issues. *See* 28 U.S.C. § 1447(d), *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995). The opportunities for this court to review removal matters have been rare and this is apparently the first time for the court to review the issue of the knowledge of the removing party as impacting on the starting of the time for removal. The Court should seize this opportunity to review this issue and exercise it supervisory jurisdiction in order to provide much needed guidance to the lower courts, litigants and their counsel on this issue and resolve any uncertainty as to the calculation of removal time.

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[13] **see** Petition for Writ of Certiorari at 15-17.

CONCLUSION

In summary, if the Court of Appeals' decision is allowed to stand, a party may wait many months while state court litigation proceeds apace (even allowing other co-defendants to carry the defense burden) to remove the case to federal court to start anew, despite indisputably having knowledge that the case was always removable. Given the thousands of cases removed annually, in conjunction with the certiorari granted in Murphy Bros., the Court can establish guidelines for the parties and the courts to follow.

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES A. IKARD
211 North Robinson, Suite 600
Oklahoma City, Oklahoma 73102
(405) 239-7046

Counsel of Record

E. HART GREEN
MITCHELL A. TOUPS
WELLER, GREEN, MCGOWN & TOUPS
2615 Calder Street, Suite 400
Beaumont, Texas 77702
409-838-0101

SHARON A. WRIGHT
ROBERT J. BINSTOCK
REICH & BINSTOCK
4624 San Felipe, Suite 1000
Houston, Texas, 77027
(713) 622-7271

Attorneys for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES E. AKIN,	§
ET AL.	§
Plaintiffs,	§
	§
VS.	§ NO. 1:93-CV-0382
	§
BIG THREE INDUSTRIES,	§
INC., ET AL.,	§
	§
Defendants.	§

MEMORANDUM OPINION AND ORDER DENYING
PLAINTIFFS' MOTION TO REMAND AND
GRANTING DEFENDANTS' MOTION
TO TRANSFER VENUE

Pending before the court are the following motions: (1) Plaintiffs' Motion to Remand and (2) Defendants' Motion to Transfer Venue. The court, having considered the briefs and arguments of counsel, is of the opinion that the Plaintiffs' Motion to Remand should be DENIED and the Defendants' Motion to Transfer Venue should be GRANTED.

I. BACKGROUND

This toxic tort case arises out of alleged chemical exposure at Tinker Air Force Base in Oklahoma City, Oklahoma. Approximately two hundred Tinker employees brought negligence and strict products liability claims against various corporate manufacturers. Plaintiffs allege multiple adverse health affects resulting from work performed on jet engines manufactured for the United States Air Force.

On November 13, 1992, plaintiffs filed a state court suit in Beaumont, Texas. The pleadings alleged "[p]laintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma." The plaintiffs further alleged "[e]ach plaintiff. . . was exposed to the dust and fumes of the jet engine and jet engine parts" and that "plaintiffs were also exposed to numerous other hazardous chemicals while working at the air force base." Plaintiffs' first, second, and third amended petitions made similar allegations.

During discovery, defendants sent interrogatories to plaintiffs. This discovery sought evidence regarding the precise location of each exposure and the extent to which the plaintiffs performed their duties "on base." The interrogatories also sought information regarding the types of chemicals to which plaintiffs were exposed. In addition, the defendants-requested information about any adverse health effects which were caused by materials worked with at Tinker.

On July 16, 1993, the plaintiffs served responses to the

interrogatories. With respect to questions inquiring where the various plaintiffs performed their duties, each response stated "all duties were performed on base." (See, e.g., Plaintiff James E. Akin's Answers to Interrogatories, Interrogatory No. 32). Additionally, the responses identified various chemicals to which each plaintiff was exposed. (See id., Interrogatory No. 5). Finally, the plaintiffs identified the health problems, if any, caused by substances worked with at Tinker. (*See id.*, Interrogatory No. 12).

On August 13, 1993, Defendant General Electric Company (GE), joined by all other defendants, removed the case to this court. The notice of removal asserted two bases for federal Question jurisdiction: (1) the alleged exposures occurred on a federal enclave, and (2) GE was a person acting under a federal officer. Simultaneously, defendants moved to transfer venue to the Western District of Oklahoma on the grounds that it is a more convenient forum in which to litigate. In opposition, plaintiffs moved to remand, Asserting (1) federal question jurisdiction does not exist and (2) the removal was untimely.

II. PLAINTIFFS' MOTION TO REMAND

The Court first considers plaintiffs' motion to remand. Resolution of the motion requires the court to delve into issues of federal enclave jurisdiction, federal officer removal, and timeliness of removal. Addressing the issues in that order, the Court will first determine whether federal enclave jurisdiction is present.

A. Federal Enclave Jurisdiction

The Fifth Circuit described the nature of federal enclave jurisdiction in *Mater* v. Holley, 200 F.2d 123 (5th Cir. 1952). *Mater*

involved a personal injury sustained at Fort McPherson, Georgia. The plaintiff originally brought a negligence claim in federal district court, but her suit was dismissed by that court for lack of subject matter jurisdiction.

On appeal, the Fifth Circuit reversed. That court noted that as a Constitutional matter, the Congress had exclusive legislative power over "all Places purchased by the consent of the legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. Art. I, § 8, cl. 17. The Court reasoned that any law existing in territory over which the United States has exclusive sovereignty must derive its authority and force from the United States and is for that reason federal law. *Mater*, 200 F.2d at 124. The Court held that the district court had federal question jurisdiction over the case because it "would be incongruous to hold that although the United States has exclusive sovereignty in the area here involved, its courts are without power to adjudicate controversies arising there. . . ." *Id.*

James Madison proposed the idea of granting Congress exclusive legislative powers over land purchased for the public benefit. *See generally* Capt. Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55, 59 (1976). The Constitutional clause prevents state legislative interference with publiclands. Similarly, *Mater's* conclusion that there should be a federal forum in which to litigate controversies arising on such lands prevents state judicial interference with matters likely to involve substantial federal interests.

The present conflict presents a compelling argument for a

holding that federal enclave jurisdiction exists over the tort claims. The United States Air Force is entrusted with this nation's defense. The Air Force entreated plaintiffs to perform important maintenance tasks on jet engines. All plaintiffs performed all duties on Tinker Air Force Base. And the plaintiffs now claim that these very duties--repairing jet engines--resulted in personal injuries. As a result, this court holds that in a toxic exposure case such as this, when the plaintiffs' claims arise out of exposure to chemicals on base in furtherance of their employment duties, enclave jurisdiction is properly invoked. The result of this holding is that the case presents a question arising under federal law, 28 U.S.C. § 1331, and is removable under 28 U.S.C. § 1441(a).[1]

B. Federal officer Removal Jurisdiction

GE also argues that, even if federal enclave jurisdiction is not present, it is entitled to remove under 28 U.S.C. § 1442 (a) (1). That section allows federal officers or persons acting under them to remove a case provided certain requirements are met. First, since GE is not a federal officer, it must be a "Person" within the meaning of 28 U.S.C. § 1442(a)(1). Second, GE must assert a colorable claim to a federal defense. Third, GE must show that it is being sued for acts taken "under color of" or at the direction of the federal officer.

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[1] Plaintiffs' argument that state courts have concurrent jurisdiction over transitory tort actions misses the point. Whether the state court's jurisdiction is concurrent is irrelevant to the issue whether a federal question is presented. Many federal questions may be heard concurrently in a federal system. The removal statutes permit a defendant to exercise the option of having a federal question decided by a United States court.

1. **Is GE a "'person" as contemplated by 28 U.S.C. § 1442(a)(1)?**

The first question is whether GE, as a corporation, is a "Person" as that term is contemplated by 28 U.S.C. § 1442(a)(1).

The Fifth Circuit spoke to this issue in *Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55 (5th Cir. 1975). *Peterson* involved a malicious prosecution case brought by a physician against corporate defendants for his alleged wrongful suspension under the Medicare program. *Peterson*, 508 F.2d at 57. The defendants removed the case under § 1442(a)(l) alleging federal officer removal jurisdiction. The court stated that "[i]t is indisputable that each of the defendants was either an 'officer of the United States or an agency thereof, or person acting under him.'" *Id.* (emphasis added). *Peterson*, therefore, suggests that the term "person" encompasses more than just natural persons.[2] Many district courts have also concluded that 'person', as used in § 1442(a)(1) includes corporations. See *Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1102 (D.Md. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569, 572 (N.D.Cal. 1992); *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 946 (E.D.N.Y. 1992).

Plaintiffs' reliance on *International Primate Protection League v. Administrators of Tulane Educ. Fund*, _ U.S. _ , 111 S.Ct. 1700 (1991) is misplaced. *International Primate* simply holds that a federal agency is not entitled to remove under § 1442 (a)(1).

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[2] See also 1 U.S.C. § 1 (instructing that when construing Congressional acts, unless context indicates otherwise, "person" includes corporations).

That case does not apply for two reasons: First, GE is not a federal agency. Second, GE asserts it acted under the Secretary of the Air Force and not under the direction of any federal agency. In accordance with the great weight of authority, the Court therefore holds that GE is a person within the meaning of 28 U.S.C. § 1442(a)(1).

2. **Can GE assert a colorable claim to a federal defense?**

To remove as a federal officer, GE must assert a colorable claim to a federal defense. *Mesa v. California*, 489 U.S. 121 (1989). The purpose for this requirement is to ensure that the federal district court is passing on a question of federal law. In other words, assertion of the federal defense provides federal question jurisdiction which makes the case suitably removable. Therefore, the defendant removing under the federal officer statute is not bound by the well-pleaded complaint rule which ordinarily governs whether the case presents a federal question. *Mesa*, 489 U.S. 136-37.

GE argues it has a colorable claim to the government contractor defense set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987). In *Boyle*, the Supreme Court held that liability fordesign defects in military equipment cannot by imposed under state law if:

1. The United States approved reasonably precise specifications;

2. The equipment conformed to those specifications; and

3. The supplier warned the United States about the dangers in the use of the equipment.

Boyle, 487 U.S. at 512.

In opposition to the motion to remand, GE submits the Affidavit of Dempsey L. Hodges, manager of GE's Midwest City Office. Hodges states that GE manufactured the jet engines repaired at Tinker under contract with the Secretary of the Air Force or his delegee. According to Hodges, GE manufactured the engines pursuant to specifications set by the Air Force.

Although GE might or might not ultimately prevail on its government contractor defense, that issue is beside the point. All that is required under § 1442 (a) (1), as interpreted by *Mesa*, is that GE assert a colorable claim to the defense. Any determination as to the merits is collateral to the jurisdictional question here presented. The court, therefore, holds that GE has set up a colorable claim to the government contractor defense set forth by *Boyle*.

3. **In GE being sued for actions taken "under" or at the direction of a federal officer?**

Finally, GE must establish a nexus between the acts it performed at the direction of the Secretary of the Air Force and the present claims for relief. Many courts have concluded that removal is proper when the lawsuit arises out of actions taken by a government contractor at the direction of a federal officer. See, e.g., *Pack v. AC and S Inc.*, 838 F.Supp. 1099, 1103 (D.Md. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D.Cal. 1992); *Gulati v. Zuckerman*, 723 F.Supp. 353 (E.D.Pa. 1989). For example, in *Pack*, the court considered whether Westinghouse, a government contractor, acted sufficiently at the direction of the Navy when manufacturing turbine generators. The court concluded that Westinghouse satisfied the "acting under" requirement of § 1442(a)(1). *Pack*, 838 F.Supp.

at 1103.

The same rationale applies here. The plaintiffs's discovery responses indicated that certain chemicals had caused adverse health effects. The chemicals were emitted during the repair of GE's jet engines. The repair involved grinding engine parts manufactured by GE. Plainly, when a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries, the nexus requirement is satisfied. GE, therefore, acted under a federal officer and has satisfied each of the requirements necessary to assert federal officer removal jurisdiction under 28 U.S.C. § 1441(a)(1).

C. Timeliness of Removal Under 28 U.S.C. § 1446(b)

The final question is whether the defendants timely removed this case under 28 U.S.C. § 1446(b). That section requires that the notice of removal be filed within thirty days after the receipt by the defendants, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action is based. 28 U.S.C. § 1446(b). However, an exception applies if the case stated by the initial pleading is not removable--the notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. 28 U.S.C. 5 1446(b). This exception to the general rule serves the laudable purpose of preventing the defendant from having to speculate whether a case is removable. It also functions as a deterrent to the plaintiff seeking to disguise the true federal character of a

claim.[3]

The Fifth Circuit applied this exception in *Burks v. Amerada Hess Corp.*, 8 F.3d 301 (5th Cir. 1993). *Burks* involved a case which the defendants removed on the grounds that ERISA completely preempted certain of the plaintiff's state law claims. The plaintiff's original pleadings alleged that wrongful termination caused the plaintiff to lose "benefits." An amended pleading alleged the denial of benefits caused the plaintiff to suffer emotional distress. The defendants removed within thirty days after they received the amended pleading. In opposition to the removal, the plaintiff argued that his initial pleading triggered the thirty day clock and the removal, outside this period, was untimely. The Fifth Circuit reasoned that the case stated by the initial pleading was not removable because a claim that wrongful termination resulted in a loss of benefits was not completely preempted by ERISA. The rule derived from the case is that the thirty day period announced in § 1446(b) does not begin to run from an original pleading that does not specifically state a removable claim. Rather, the defendant has thirty days from the date he is on notice via receipt of a subsequent document indicating that the case is or has become removable. The issue in the present case is more complicated than that in *Burks* because the defendants rely in part on enclave jurisdiction to sustain removal. Unlike other federal question cases, whether the present pleadings set forth a removable case is not determined by reference to ordinary causes of action and elements thereof. The typical case simply involves an examination of the pleadings to determine whether the rights asserted are federal

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[3] The court in no way suggests the plaintiffs in the present case engaged in any such conduct.

rights set forth by the Constitution or Acts of Congress. Quite to the contrary, in enclave jurisdiction, the determinative fact is the precise location of the events giving rise to the claims for relief. It is only when the-geography is mapped in a certain way that an otherwise state claim presents a federal question.

The defendants maintain they timely removed within thirty days after having received discovery responses revealing the exact location the chemical exposures in fact occurred. The plaintiffs strongly disagree, arguing that their original and amended pleadings placed the defendants on notice that the case was removable. According to plaintiffs, the time to remove was not tolled because the initial pleading stated a removable case. As noted at the outset, the original petition states in relevant parts: "[p]laintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma." The plaintiffs further alleged "[e]ach plaintiff was exposed to the dust and fumes of the jet engine and jet engine parts" and that "plaintiffs were also exposed to numerous other hazardous chemicals while working at the air force base." Plaintiffs, amended petitions contained similar allegations.

The Court holds that the state court pleadings are subject to two reasonable constructions and are, therefore, ambiguous. One construction, advanced by plaintiffs, is that the phrase "while working for the United States Air Force at Tinker Air Force Base", is a *geographical* modifier, referring to the location of the exposures. The other, advanced by defendants, is that the entire phrase is a *durational* modifier, describing the time period in which the exposures occurred. Regardless of which construction is more plausible, they are both reasonable. At the hearing on this matter,

plaintiffs sought to dispel the defendants' construction as unreasonable. However, the duration of the exposures is highly relevant to a defendant any time it reviews a toxic tort pleading because of its significance as to limitations periods. Further, the exposure period is relevant as to causation and the extent of injury. Finally, the length of exposure time is relevant insofar as it might absolve a defendant which made few or no product sales during a given period. In addition, as defendants point out, the pleadings do not exclude the possibility that some or all plaintiffs claimed injury due to exposures occurring off-base. Had some exposure occurred off-base, the defendants burden of establishing enclave jurisdiction would have been heavier.[4]

The court, therefore, holds that the pleadings are ambiguous and the thirty days set forth in 28 U.S.C. S 1446(b) were tolled until the defendants received sufficient notice of removability via receipt of an "other paper". *See Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1101-02 (D.Md. 1993) (holding that when initial pleading required defendant to guess as to removability, such pleading is insufficient to trigger thirty day limit). This holding advances both policies behind § 1446(b)--the defendants should not have to speculate as to removability, and plaintiffs should not be encouraged to draft pleadings with an eye toward insulating federal cases from removal.

The discovery responses received by the defendants without doubt provided notice that the case was removable. Defendants

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[4] When exposures allegedly occur partially inside and partially outside the boundaries of an enclave an argument would surface that the state"s interest increases proportionally, while the federal interest decreases.

correctly point out that many courts have held that discovery responses can serve as "other papers" within the meaning of §1446(b). See, e.g., Chapman -18, *Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992), cert. denied, _ U.S. _, 113 S.Ct. 1402 (1993), *Johnson v. Dillard Department Stores, Inc.*, 836 F.Supp. 390, 391 (N.D.Tex. 1993); *Pack*, 838 F.Supp. at 1101-02; *Jong v. General Motors Corp.*, 359 F.Supp. 223, 226 (N.D.Cal. 1973). The interrogatory answers informed the defendants that all plaintiffs performed all duties on Tinker Air Force Base, and all claimed chemical exposure occurred while plaintiffs performed these duties. These papers precisely identified the location of the claimed exposures, which is the singularly relevant fact when Determining the applicability of enclave jurisdiction. As such, the defendants were required to remove within thirty days from Receipt of these responses. Defendants have done just that. The court concludes the removal was timely under § 1446(b).[5]

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[5] For the same reasons discussed above, federal officer removal was timely. The responses provided GE with notice that certain products manufactured by GE caused plaintiffs' injuries. Thus, the discovery adequately notified GE of the required nexus between its manufacturing process and the claimed injuries. *See Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1102 (D.Md. 1993). The court notes, however, that the principal dispute at the hearing on this matter was whether GE timely asserted federal enclave jurisdiction.

Moreover, plaintiffs, waiver argument is unsound. Plaintiffs argue that because defendant Chemical Specialists and Development, Inc. filed a motion for summary judgment in state court, this resulted in a waiver of the right to remove. Waiver is the voluntary relinquishment of a known right. Because the court has concluded

For the above reasons, the plaintiffs' motion to remand is DENIED.

III. DEFENDANTS' MOTION TO TRANSFER VENUE

Defendants move to transfer venue to the Western District of Oklahoma. Given that the court has denied the motion to remand, transfer is appropriate under 28 U.S.C. § 1404. That section allows for discretionary transfer of cases for the convenience of the parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a).

It is a rare case that more aptly illustrates the policies driving § 1404. None of the plaintiffs resides in the Eastern (or any other) District of Texas. All of the alleged exposure occurred in Oklahoma City, Oklahoma. The defendants allegedly delivered their products to Tinker Air Force Base, located in Oklahoma City. The Plaintiffs are Oklahoma residents. The only connections to Beaumont are lawyers representing the parties. Having weighed the above factors relevant under § 1404(a), the Court concludes that this case should be transferred to the Western District of Oklahoma.

The defendants, motion to transfer venue to the Western District of Oklahoma is hereby GRANTED. The Clerk of the Court is hereby ORDERED to forward the file of this matter to the Clerk

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the case was not removable until plaintiffs served discovery responses, the defendants did not possess the removal option at the time Chemical Specialists filed its motion for summary judgment. Chemical Specialists' actions could not waive a right which had not yet accrued. Therefore, the court holds no waiver occurred.

of the Court for the Western District of Oklahoma.

ORDERED, ADJUDGED, and DECREED that Plaintiff 's Motion to Remand is DENIED. It is further ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Transfer Venue to the Western District of Oklahoma is GRANTED. It is further ORDERED that decision on any other pending motions is deferred to the court in the Western Division of Oklahoma to which this case is assigned.

SIGNED this the 31st day of March, 1994.

/s/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES E. AKIN,	§
ET AL.	§
Plaintiffs,	§
	§
VS.	§ NO. 1:93-CV-0382
	§
BIG THREE INDUSTRIES,	§
INC., ET AL.,	§
	§
Defendants.	§

ORDER

For the reasons set forth in the court's memorandum opinion, it is ORDERED that the plaintiffs' motion to remand is DENIED. The defendants' motion to transfer venue to the Western District of Oklahoma is GRANTED. The Clerk of Court is ORDERED to deliver the file to the Clerk of Court for the Western District of Oklahoma. Rulings on all other pending motions are DEFERRED to the Court of the Western District of Oklahoma to which this case is reassigned.

SIGNED this the 31st day of March, 1994.

/s/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES E. AKIN,	§	
ET AL.	§	
Plaintiffs,	§	
	§	
VS.	§	NO. 1:93-CV-0382
	§	
BIG THREE INDUSTRIES,	§	
INC., ET AL.,	§	
	§	
Defendants.	§	

ORDER

Pending before the court are the following motions: (1) Plaintiffs' Motion to Reconsider and (2) Plaintiffs' Motion to Attach Additional Exhibits.

This court issued its memorandum opinion and order on March 21, 1994. On March 31, 1994, plaintiffs filed their motion to reconsider. Inadvertently omitted from that motion was a copy of an arbitration award which, according to plaintiffs, deprives the court of federal officer removal jurisdiction because it suggests the United States government was never warned about potentially hazardous products manufactured by General Electric.

The motion for leave to attach this exhibit is GRANTED. The court will now address the plaintiffs' motion for reconsideration.

The motion for reconsideration essentially rehashes the same basic arguments offered by plaintiffs at the hearing on this matter and in the briefing. The court has very carefully considered the law in this area and remains of the opinion that its earlier opinion was correct. The motion to reconsider is therefore DENIED, with one caveat: the court's earlier memorandum opinion deferred ruling on all pending motions to the court sitting for the Western District of Oklahoma. One of these motions was filed by General Electric for leave to file a third party action against the United States of America. This motion is GRANTED. Rulings on any remaining motions is DEFERRED to the court sitting for the Western District of Oklahoma. The clerk is again ORDERED to transfer the file in this cause to the Clerk of Court for the Western District of Oklahoma. All future filings in this matter are to be made with the Clerk of Court for the Western District of Oklahoma.

SIGNED this the 9th day of May, 1994.

/S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES E. AKIN, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CIV-94-832-C
BIG THREE INDUSTRIES, INC., et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court for consideration of plaintiffs' motion to remand. Having reviewed the pleadings, the Court finds plaintiffs' motion is untimely, previous rulings made in this case are correct and on this issue constitute the law of this case, and, in any

event, the denial of the motion to remand was not clearly erroneous or manifestly unjust.

IT IS THEREFORE ORDERED that plaintiffs' motion to remand is hereby DENIED.

IT IS SO ORDERED this 12 day of August, 1994.

/s/
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

James E. AKIN; Richard G. Arellano; Charles L. Baldwin; Annie M. Barnes; Terry D. Blain; Marcia Bannock; Delton E.Brown; Timothy L. Caraway; Thomas W. Clark; Richard Cotey; Connie Cottrell; Ronnie D. Cottrell; Steven L. Coy; Hugh Crow; Nathan D'Amico; Donna M. Davis; Louis R. Dickinson; Ollie Dillishaw, Jr.; Danny L. Dunn; Jenny L. Duren; Bill R.Durington; Steven Ray Duty; Leon Ealon; Debra M. Emerich; Janette K. Farley; Jon G. Gabbard; Linda D. Gatewood; Max R.Glover; Wendell P. Gomez; Eric L. Janousek; David Keiser; Larry D. Lidell; Robert C. Love; Jack L. Manning; Thomas Marshall; Michael D. Mowles; Jeffrey Murray; Melvin E.Norton; Zenephor Overstreet; James M. Owen; Terry W. Oxley; Ronald K. Peoples; Michael Phillips; Marie L. Plumlee; Phillip Plumlee; Rick Reames; Jack D. Rhoden; Wayne Richardson; Norma Roberts; Charlon S. Rogers; Sandra Rolland; Marlys Rone; Judy A. Rowland; Tony E. Ruble; ReathaR. Schlegel; Gloria Shelton, as representative of the estate of Wilton F. Shelton, deceased; Charlie Sheppard; Herman D.Sikes; William D. Slattery; Clayton D. Statsny; Melissa C.Statsny; Gayla S. Staton; Martha J. Storozyszyn; Rick L.Stuart; Mike Sullivan; Emmett Thomas, Jr.; Benjamin Tingle; Marilyn J. Tracey; Helen Walker; Randy F. Wiens; Leonard Williams; Leonard Williams; Morten D. Williams; Glenda Wright; Herman Dale Wright; Kenneth L. Wright; Albert A. Wyatt; James D. Wyatt; Johnnie R. York; Larry N. Smith; Danny Driskill; Gerald Houston,

Plaintiffs--Appellants,

V.

ASHLAND CHEMICAL COMPANY; Dow Chemical Company; McGean-Rohco, Inc.; Thunderbird Sales Company, Inc.,

Defendants--Appellees,

and

E.I. DUPONT DE NEMOURS & CO.; General Electric Company; J.W. Harris Co., Inc; Metallurgical Technologies, Inc.; Ashland Oil; Spray on Systems, Inc.; Plaze, Inc.; Royal Lubricants Company, Inc.; Stetco Inc.; Thompson & Formby, Inc.; L & F Products, Inc.; Miniwax Company, Inc.; Dow Industrial Service of the Dow Chemical Co.; Dowell Division of the Dow Chemical Co. & Brasos Oil & Gas Division of the Dow Chemical Co., Dow Industrial Service of the Dow Chemical Company; Dow Division of the Dow Chemical Company; Brazos Oil & Gas of the Dow Chemical Company; 3M Company; Minnesota Mining and Manufacturing Corporation; Diamond Shamrock Corporation; Diamond Shamrock Corporation, aka Occidental Electro-Chemicals Inc.; Allied Corporation; Allied Signal, Inc.; Exxon Corporation; Exxon Chemical; Mobil Oil Corporation; Ameron, Inc.; Blazer East, Inc., formerly know as Koppers Company, Inc.; Saral Protective Coatings Co.; Seymour of Sycamore, Inc.; Dexter Corporation; Uni-Kem International, Inc.; Miller-Stephenson Chemical Company, Inc., formerly known as Miller-Stephenson Company of Conn, Inc.; Cabot Corporation; Borden, Inc.; Phipps Products, a Division of Dow Chemical Company; Desoto, Inc.

Defendants,

V.

GENERAL ELECTRIC COMPANY,

Third-Party-Plaintiff,

V.

UNITED STATES of America,

Third-Party-Defendant.

No. 97-6030.

United States Court of Appeals, Tenth Circuit.
Aug. 31, 1998.
Appeal from the United States District
Court for the Western District of Oklahoma (D.C. No.
Civ-94-832-C).

Before TACHA and BALDOCK, Circuit Judges, and GREENE, District Judge.(FN)

BACKGROUND

On November 13, 1992, plaintiffs filed this toxic tort case in state court at Beaumont, Texas. After receipt of answers to interrogatories, defendant General Electric (GE) removed the case to the United States District Court for the Eastern District of Texas. The Texas district court judge upheld removal jurisdiction, denied plaintiffs' motion to remand and transferred venue to the Western District of Oklahoma as a more convenient forum. The Oklahoma district court judge granted summary judgment in favor of defendants.

(FN) The Honorable J. Thomas Green, Senior United States District Judge for the District of Utah, sitting by designation.

Plaintiffs appealed, arguing that removal was untimely and summary judgment unwarranted.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We review a grant of summary judgment de novo, applying the same standard as the district court. See *Wolf v. Prudential Ins. Co. of Am.*, 50 F. 3d 793, 796 (10th Cir. 1995). "[We] examine the record to determine whether any genuine issue of material fact was in dispute; if not, we determine [whether] the substantive law was correctly applied," and in so doing "we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing" the motion. *Applied Genetics Int'l, Inc. v. First Affiliated Sec. Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990).

However, "where the non moving party will bear the burden of proof at trial on a dispositive issue" that party must "go beyond the pleadings" and designate specific facts so as to "make a showing sufficient to establish the existence of an element essential to that party's case" in order to survive summary judgment. *Celotex*, 477 U.S. at 322, 324. A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See *Vitkus v. Beatrice Co.*, 11 F. 3d 1535, 1539 (10th Cir. 1993).

DISCUSSION

1. REMOVABILITY TO FEDERAL COURT

-- Federal Enclave Jurisdiction

The United States has power and exclusive authority "in all Cases whatsoever ... over all places purchased" by the government "for the erection of "Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17. Such places are "federal enclaves" within which the United States has exclusive jurisdiction. [1] Personal injury actions which arise from incidents occurring in federal enclaves may be removed to federal Court as a part of federal question jurisdiction. There is no dispute that Tinker Air Force Base at Oklahoma City, Oklahoma is such a federal enclave.

-- Federal Officer Removal

Plaintiffs argue that the removal petition was defective in that all co-defendants did not consent and join in the removal papers. In the case at bar, defendant GE removed the case based on its status as a "person acting under" a federal officer, as well as the status of Tinker Air Force Base as a federal enclave. Federal officer removal

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[1] The Constitutional language is that the Congress shall have power "[t]o exercise exclusive Legislation," see id., which has been construed to mean exclusive jurisdiction under 28 U.S.C. § 1331. See *Mater v. Holley*, 200 F.2d 123, 124-25 (5th Cir. 1952). Noting that the United States has exclusive sovereignty in enclave areas, the Fifth Circuit said that it "would be incongruous to hold that ... (courts of the United States) "are without power to adjudicate controversies arising" therein. Id. 124.

constitutes an exception to the general removal rule under 28 U.S.C. § 1441 and § 1446 which require all defendants to join in the removal petition. The exception is set forth at 28 U.S. C. § 1442(a)(1) which provides in part that:

(a) "A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof **or any officer (or any person acting under that officer)** of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office .....". (emphasis added).

This statutory exception allows a federal officer independently to remove a case to federal court even though that officer is only one of several named defendants. The Congressional policy permitting federal officer removal could easily be frustrated by simply joining non-federal defendants unwilling to remove if consent of co-defendant(s) were required. Thus in *Bradford v. Harding*, 284 F.2d 307, 310 (2d Cir. 1960), the Second circuit ruled that " [t]he 'general government' must be able to assure each of its officers that a federal forum will be available if he wishes it, whether others sued with him wish it or no." Likewise, in *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir.1965), the Fifth circuit held "it is settled that the filing of a petition for removal by a single federal officer removes the entire case to the federal court." In *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F. 2d 1310, 1315 (9th Cir. 1981), the Ninth circuit reasoned that "[s]ince the federal officer is the only one entitled to remove under § 1442, he

alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court." In *City of Aurora v. Erwin*, this court noted the importance to the United States and the absolute nature of federal officer removal jurisdiction, quoting the Supreme Court that exercise of such jurisdiction "'should not be frustrated by a narrow, grudging interpretation.'", 706 F. 2d 295, 296 (10th Cir. 1983) (quoting *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981)). On the basis of the foregoing, we hold that G.E. properly removed the case to federal court without the consent of co-defendants.

-- Right to Remove Must be Clearly Determinable

The right to remove a case to federal court is determined from allegations set forth in the initial pleading, "or other paper from which it may first be **ascertained** that the case is one which is or has become removable . . ." 28 U.S.C. § 1446(b) (emphasis added).

Appellants argue that removal was untimely because the initial pleading provided defendants with all necessary information to ascertain removability.[2] Appellees argue that plaintiffs' allegations

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[2] In this regard, appellants rely on non-binding case law from other jurisdictions to the effect that where it is apparent that removal may be justified a duty is imposed upon movants to investigate potential reasons for removal. See *Scott v. Greiner*, 858 F.Supp. 607, 610 & n. 2 (S.D.W.Va.1994) (motion for more definite statement required where federal question jurisdiction cannot be ascertained from the complaint); *Golke v. Lee Lumber & Bldg. Materials Corp.*, 671 F. Supp. 568, 571 (N.D. 111. 1987) (inartfully pleaded complaint provided sufficient notice to start time running for

of injuries sustained "while working at" Tinker Air Force Base and "while working for" the United States were ambiguous.[3] The district judge in Texas ruled that the word "at" in the phrase "while working at" could serve as either a "geographical modifier" or a "durational modifier" (Order at 12, 13), and that only after receipt of "other paper"--in this case answers to interrogatories--were defendants provided sufficient notice that the conduct sued upon took place wholly within the enclave, and under federal direction.[4]

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removal); *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1256 (9th Cir. 1989) (inartfully pleaded complaint may provide sufficient notice for removal).

[3] The initial pleading could have been understood as referring to injuries sustained off Base but during the time frame plaintiffs were working on the Base and/or working for the government. Plaintiffs alleged that they were "exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma," and that they "were also exposed to numerous other hazardous chemicals **while working at** the air force base." Appellant's App. at 1, 5, 6 (emphasis added).

[4] Judge Cobb ruled that only after receipt of the Answers to Interrogatories were federal enclave and federal officer removal jurisdiction apparent. The court said:

> The interrogatory answers informed the defendants that all plaintiffs performed all duties on Tinker Air Force base, and all claimed chemical exposure

We agree that the initial pleading in this case was ambiguous in that it did not provide unequivocal notice of the right to remove, and that the first clear notice of removability was given in answer to an interrogatory.[5]

> occurred while plaintiffs performed these duties. These papers precisely identified the location of the claimed exposures, which is the singularly relevant fact when determining the applicability of enclave jurisdiction. As such, the defendants were required to remove within thirty days from receipt of these responses. Defendants have done just that. The court concludes that removal was timely under § 1446(b).

Akin v.. Big Three Indus., Inc., 851 F. Supp. 819, 825 (E. D. Tex. 1994). The court further stated that:

> For the same reasons discussed above, federal officer removal was timely. The responses provided GE with notice that certain products manufactured by GE caused plaintiffs' injuries. Thus, the discovery adequately notified GE of the required nexus between its manufacturing process and the claimed injuries.

Id. at 825 n. 5.

[5] In response to interrogatories, defendants learned that the chemical exposure only occurred within the confines of the Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiff Akin's

In *DeBry v. Transamerica Corp.*, 601 F. 2d 480, 489 (10th Cir. 1979), we held that " [i]f the statute is going to run, the notice ought to be unequivocal. It should not be one which may have a double design." We further ruled that "ascertained" as used in section 1446(b) means a statement that "should not be ambiguous" or one which "requires an extensive investigation to determine the truth." Id. at 490. *DeBry* is consistent with our prior ruling in *Ardison v. Villa*, 248 F. 2d 226 (10th Cir. 1957), in which we interpreted the predecessor provision of § 1446(b), holding that the key to determining the date from which the clock begins to run is when the defendant is able to "intelligently ascertain removability." Id. at 227. We disagree with cases from other jurisdictions which impose a duty to investigate and determine removability where the initial pleading indicates that the right to remove may exist. [6] Rather, this court requires clear and unequivocal notice from the pleading itself, or a subsequent "other paper" such as an answer to interrogatory.

-- Proceedings in State Court Before Removal

Plaintiffs contend that defendant Chemical Specialist was barred from consenting to removal because it had previously filed a motion for summary judgment in state court, which motion was pending when removal was granted, citing *Scholz v. RDV Sports, Inc.*, 821 F.Supp. 1469, 1471 (M.D.Fla.1993). That case is inapposite because actions in state court by defendant Chemical Specialist in this

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Response to Interrogatory 32 was that "all duties were performed base."

[6] See supra footnote 3.

case were taken before it was unequivocally apparent that the case was removable.[7] This court rules that a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove.

Proceedings in Federal Court after Removal

After removal of the case to federal court and the motion to remand was denied, plaintiffs voluntarily amended their complaint, asserting a cause of action in federal court against defendants Dow Chemical, Ashland Chemical and McGean-Rohco, Inc. This court holds that plaintiffs cannot voluntarily invoke, and then disavow, federal jurisdiction. In *Bernstein v. Lind-Waldock & Co.*, the Seventh Circuit stated:

> But once [plaintiff] decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there. Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the

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[7] In *Scholz*, the court held that filing motions and scheduling hearings on motions indicated an intent to litigate in state court, which resulted in waiver of the right to remove the case. However, plaintiff's claims included federal employment discrimination claims under Title VII, so that the right to remove was apparent from the face of the Complaint.

> federal question in his amended complaint voluntarily, and if he lost he could claim to have raised it involuntarily and to be entitled to start over in state court. He "cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses." (citations omitted).

see also *Barbara v. New York Stock Exch., Inc.*, 99 F. 3d 49 (2d Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F. 3d 937 (6th Cir. 1995). In *Johnson v. Odeco Oil & Gas Co.*, 864 F. 2d 40 (5th Cir. 1989), an amendment in federal court after removal was found to constitute a waiver of later objection to removal. In the circumstances of this case, the amendment adding parties also amounted to a waiver of alleged defective removal.

II WARNINGS CONCERNING HAZARDOUS MATERIALS NEED NOT BE PROVIDED TO "SOPHISTICATED" AND KNOWLEDGEABLE PURCHASERS

--State Law Applies in Failure to Warn Cases

This products liability action is premised on the manufacturer's failure to warn purchaser's employees of the danger of low level exposure to certain chemicals. We apply Oklahoma law in such cases. See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir.1996). We review the district court's interpretation of Oklahoma law de novo, see *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), and "as a matter of independent federal procedure we utilize the normal federal standards of appellate review to examine the district court's decision process." *Mid-America Pipeline Co. v. Lario Enters.*, 942 F. 2d 1519, 1524

(10th Cir. 1991).

-- Sophisticated Purchaser Defense

Plaintiffs contend that they were injured while cleaning jet engine parts due to low-level, chronic exposure to defendants' chemicals. Plaintiffs argue that defendants breached their duty to warn potential users of the dangerous propensities of these chemicals even though the chemicals supplied were not improperly manufactured or contaminated.

Under Oklahoma law, the general rule applies that chemicals will be considered defective only if the following three elements are satisfied: (1) the product was unreasonably dangerous; (2) there was a failure to warn of its dangerous characteristics; and (3) the failure to warn was the cause of the plaintiff's injury. See *Cunningham v. Charles Pfizer & Co.*, 532 P. 2d 1377 (Okla. 1975). But Oklahoma law authorizes an important exception to the second element of the general rule, namely that there is no duty to warn members of a profession against dangers generally known to members of that profession. Hence, in *Mayberry v. Akron Rubber Mach. Corp.*, the court said that "where the danger or potentiality of danger is known or should be known to the user, the duty (to warn) does not attach." 483 F.Supp. 407, 413 (N.D.Okla.1979) (citing *Berry v. Porsche Audi, Inc.*, 578 P.2d 1195 (Okla. 1978); *Nicholson v. Tacker*, 512 P.2d 156 (Okla. 1973)); see also *Davis v. Fox River Tractor Co.*, 518 F. 2d 481 (10th Cir.1975); *Marshall v. Ford Motor Co.*, 446 F.2d 712 (10th Cir.1971). --We read Oklahoma case law to impose no duty to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. Plaintiffs rely on the argument that the Air Force did not actually know of the risks involved in low-level chemical exposure. However,

Oklahoma law clearly imposes a "should have known" standard as well, applicable to "knowledgeable purchasers," *Mayberry*, 483 F. Supp. at 413. This is tantamount to the familiar "sophisticated purchaser defense" exception which is based upon the principles set forth in the Restatement (Second) of Torts.[8] This exception absolves suppliers of the duty to warn purchasers who are already aware or should be aware of the potential dangers. See *O'Neal v. Celanese Corp.*, 10 F.3d 249, 251-52 (4th Cir.1993); see also *Davis v. Avondale Indus.*, 975 F.2d 169, 171 (5th Cir.1992) (a manufacturer is not required to provide an adequate warning about his product when the user or handler of the product already knows or reasonably should be expected to know of the characteristics of the product that may cause damage and the danger of such characteristics.) In *Apperson v. E.I. du Pont de Nemours & Co.*, 41 F.3d 1103, 1108 (7th Cir. 1994), the Seventh Circuit stated: "a duty to warn arises only when there is unequal knowledge with respect to the risk of the harm."

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[8] One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) **has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition**, and (c) fails to exercise reasonable care to inform them of this dangerous condition of the facts which make it likely to be dangerous. Restatement (Second) of Torts § 388 (1965)(emphasis added).

Because of the wealth of research available, the ability of the Air Force to conduct studies, and its extremely knowledgeable staff, we find that the Air Force easily qualifies as a knowledgeable purchaser" that should have known the risks involved with low-level chemical exposure. Employees of the Air Force are also deemed to possess the necessary level of sophistication, so that defendants had no duty to warn the Air Force or its employees of the potential hazards. See *Mayberry*, 483 F.Supp. at 413.

Based upon the foregoing, this court concludes from uncontroverted evidence viewed in a light most favorable to the plaintiffs that the district court's decision granting defendants' Motion for Summary Judgment should be affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
APR 5 1999
OFFICE OF THE CLERK

No. 98-1420

In The

Supreme Court of the United States

October Term, 1998

JAMES E. AKIN, *et al.*,

Petitioners,

v.

ASHLAND CHEMICAL COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORT G. WELCH, Esq.
WELCH, JONES & SMITH, P.C.
2601 Northwest Expressway
601 Oil Center West
Oklahoma City, Oklahoma 73112
(405) 848-2000

CLYDE A. MUCHMORE
(Counsel of Record)
KELLEY C. CALLAHAN
CROWE & DUNLEVY
A PROFESSIONAL CORPORATION
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Counsel For Respondents

April, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21788

QUESTION PRESENTED

Does the thirty-day time period for removal under 28 U.S.C. § 1446(b) begin to run upon defendant's receipt of an initial pleading which admittedly gives, at most, equivocal or ambiguous notice that plaintiff is seeking relief over which a federal court would have subject matter jurisdiction, or, as the court of appeals held herein, only upon receipt of a pleading or other paper which unambiguously gives notice of the right to remove?

As discussed below, the question presented by petitioners, even as correctly formulated, cannot lead to a change in result in this case, since the court of appeals based the same decision on an independent ground – that petitioners waived their objections to removal.

LIST OF PARTIES[1]

Ashland Chemical Company is a division of Ashland, Inc. A list of the nonwholly owned subsidiaries of Ashland, Inc. is at Resp. App. 176.

Dow Chemical Company does not have a parent company. A list of its nonwholly owned subsidiaries is at Resp. App. 179.

McGean-Rohco, Inc. does not have a parent company. Its nonwholly owned subsidiaries include: McGean-Rohco Worldwide, Inc., McGean-Rohco Mexico S.A., McGean-Rohco Dinesh, Ltd., Alembic Insurance Company, Inova Plating, Ltd., Folke Stigen Fabricks, Kelly McGean Investment Pte., Ltd., and McGean-Rohco Chemical Corporation, Ltd.

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[1] Petitioners failed to comply with Supreme Court Rule 14(1)(b), requiring that the names of all parties be listed, however, a list of Petitioners can be found at Pet. App. A-21 and the three Respondents are listed here.

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OPINIONS AND ORDERS BY THE DISTRICT COURTS AND COURTS OF APPEAL

Petitioners identify only the officially reported opinions of the United States District Court for the Eastern District of Texas in *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819 (E.D. Tex. 1994), and of the Tenth Circuit Court of Appeals in *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998). The unreported opinion of the United States District Court for the Western District of Oklahoma, granting summary judgment for respondents, is also relevant to a consideration of the petition, as demonstrated below. *See, Akin v. Big Three Industries, Inc.*, No. CIV-94-832-C (W. D. Okla. Dec. 13, 1996), Resp. App. 157-162. Petitioners also unsuccessfully sought a writ of mandamus from the Fifth Circuit Court of Appeals to review the order denying their motion to remand which is reported in *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819 (E.D. Tex. 1994). *See, In re: James E. Akin*, No. 94-40589, (5th Cir. July 28, 1994), Resp. App. 52.

STATEMENT OF THE CASE

Petitioners omit significant portions of the case which have a direct bearing upon the Court's consideration of whether to grant the petition for writ of certiorari. Consequently, this statement is offered, and additional portions of the record included in the appendix to this brief.

A. Pre-Removal Proceedings In State Court.

On November 13, 1992, 126 Oklahoma residents commenced this products liability damage action in a state court in Beaumont, Texas, against 12 defendants, none of which remained as parties when the Oklahoma federal court granted summary judgment for respondents, dismissing the claims of petitioners on the merits. Resp. App. 1-13 and 157, 161-162. By various amended state court petitions the number of Texas state court plaintiffs, all Oklahoma residents, increased to 177, with one additional defendant, United Technologies, Inc. Resp. App. 14-30. In each state court petition plaintiffs allege they suffered physical and emotional injuries from their exposure to toxic chemicals and metals "while working at Tinker Air Force Base in Oklahoma City, Oklahoma." Resp. App. 22-23. Plaintiffs claim their exposures occurred while they were working on jet engines manufactured by two original defendants, General Electric Company (GE) and Pratt & Whitney Company, Inc. (and its successor, United Technologies Corporation). Resp. App. 22-23. According to the original plaintiffs, dust was emitted from metal in the jet engines on which plaintiffs worked with various cleaning chemicals. Resp. App. 23. These chemicals were allegedly manufactured or sold by various of the original 12 defendants. Resp. App. 22. While various legal theories are mentioned in the state court petitions, in essence plaintiffs claimed the original defendants were liable because they failed to warn of dangers to the plaintiffs of exposure to the metals in the jet engines and to chemicals used in the maintenance of those engines. Resp. App. 23.

B. The Removal Proceedings.

On July 16, 1993, the state court plaintiffs served responses to interrogatories propounded by GE, in which each plaintiff stated his or her work duties referred to in the state court petitions "were performed on base," i.e., Tinker Air Force Base (TAFB). *Akin v. Big Three Industries, Inc.*, 851 F.Supp. at 821 (Pet. App. A-3). On August 13, 1993, within thirty days of receipt of the interrogatory answers, GE filed a notice of removal in the United States District Court for the Eastern District of Texas, Beaumont Division, in which the other defendants joined. *Id.*; Resp. App. 31-36.

The first ground for removal was that the plaintiffs' claims arose under the Constitution and laws of the United States because the interrogatory answers disclosed all plaintiffs were civilian employees of the Department of Defense and they were asserting injuries which occurred exclusively within the territorial boundaries of TAFB, while in the course of work performed by the plaintiffs. Resp. App. 33-34. Accordingly, GE asserted the case came within the court's "federal enclave" jurisdiction under 28 U.S.C. § 1331, and hence was removable pursuant to 28 U.S.C. § 1441.[1]

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[1] U.S. Const. art. I, § 8 cl. 17 gives Congress the power to exercise "exclusive Legislation" over land, areas, and places within the states acquired for federal purposes: "the Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . " By virtue of this constitutional provision the federal district courts have original, although not exclusive,

The second ground for removal was the existence of a colorable claim to a federal defense by GE to the claims of the plaintiffs, based upon the fact that the interrogatory answers affirmatively disclosed that the plaintiffs were asserting they were injured while working as civilian employees of the Air Force in the course of maintenance of aircraft designed and manufactured by GE pursuant to contracts between GE and the Secretary of Defense. Resp. App. 34-35. GE asserted that these contracts included detailed specifications imposed by the Air Force for the design, manufacture, and maintenance of jet engines, and that GE acted under the authority of an officer of the United States in designing, manufacturing, and establishing maintenance procedures for, the jet engines. *Id.* On the basis of this record GE asserted a governmental contractor defense to the claims of the plaintiffs, and a right to remove the action, without regard to the existence of an independent federal jurisdictional basis, as a person

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subject matter jurisdiction over transitory tort actions which arise upon or within a federal enclave. *Mater v. Holley*, 200 F.2d 123, 124-125 (5th Cir. 1952); *Stokes v. Adair*, 265 F.2d 662, 666-667 (4th Cir. 1959); *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) (Pet. App. A-34-35); *Parker v. Main*, 804 F.Supp. 284, 286 (M.D. Ala. 1992); and *Quadrini v. Sikorsky Aircraft Division*, 425 F.Supp. 81, 85 (D. Conn. 1977). Since the district court has original federal question jurisdiction of such a case, it is likewise removable pursuant to 28 U.S.C. § 1441. *E.g., Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717, 718 (5th Cir. 1969); *Fung v. Abex Corp.*, 816 F.Supp. 569, 571 (N.D. Cal. 1992); and *Guillory v. Ree's Contract Service, Inc.*, 872 F.Supp. 344, 345 (S.D. Miss. 1994).

acting under an officer of the United States within the federal officer removal statute, 28 U.S.C. § 1442(a)(1). *Id.*[2]

The state court plaintiffs timely moved to remand. Their primary argument was that the removal was untimely because GE could have determined from the original state court petition that grounds for removal existed. Resp. App. 40-42. Secondly, they asserted that th existence of concurrent jurisdiction of transitory tort claims arising within a federal enclave precluded removal. Resp. App. 42-44. Finally, they argued GE failed to establish a colorable claim to the governmental contractor defense which would support removal under 28 U.S.C. § 1442(a)(1). Resp. App. 45-49.

In *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819 (E.D. Tex. 1994), (Pet. App. A-1-16) the motion to remand was denied, and the case transferred, pursuant to 28

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[2] GE's right to remove as a person acting under a federal officer was based upon the existence of a "colorable defense" under federal law, a necessary requirement for removal under § 1442(a)(1). *See Willingham v. Morgan*, 395 U.S. 402, 406-407 (1969) and *Mesa v. California*, 489 U.S. 121, 135-136 (1989). The "colorable defense" was the governmental contractor immunity or defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). A number of cases have recognized that the existence of a colorable governmental contractor defense justifies removal by a federal contractor under § 1442(a)(1). *E.g., Fung v. Abex Corp.*, 816 F.Supp. 569, 571-572 (N.D. Cal. 1992); *Pack v. AC&S, Inc.*, 838 F.Supp. 1099, 1103 (D. Md. 1993), *reconsid. denied*, 857 F.Supp. 26 (D. Md. 1994); *Winters v. Diamond Shamrock Chemical Corp.*, 901 F.Supp. 1195, 1199-1202 (E.D. Tex. 1995); and *Crocker v. Borden, Inc.*, 852 F.Supp. 1322, 1325-1327 (E.D. La. 1994).

U.S.C. § 1404(a), to the United States District Court for the Western District of Oklahoma.[3]

The court initially found a "compelling argument" to exist for the application of principles of federal enclave jurisdiction where injuries to federal employees are alleged to have occurred on a federal military base while the employees were performing maintenance on military jet engines. 851 F.Supp. at 822 (Pet. App. A-4-5). Plaintiffs' argument concerning the existence of concurrent jurisdiction in the Texas state court for claims arising on a federal enclave was rejected as "irrelevant" to the issue of whether a federal question justifying removal was presented, since the concurrency of federal and state jurisdiction is the precise factor that makes the state court case removable. *Id.*, at fn. 1. (Pet. App. A-5 n. 1).

The court next found the case removable under § 1442(a)(1), after analysis of the elements of the federal governmental contractor defense. 851 F.Supp. at 823-824 (Pet. App. A-5-9).

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[3] As Judge Cobb noted in granting the motion to transfer:

> It is a rare case that more aptly illustrates the policies driving § 1404. None of the plaintiffs resides in the Eastern (or any other) District of Texas. All of the alleged exposure occurred in Oklahoma City, Oklahoma. The defendants allegedly delivered their products to Tinker Air Force Base, located in Oklahoma City. The plaintiffs are Oklahoma residents. The only connections to Beaumont are lawyers representing the parties.

851 F.Supp. at 826 (Pet. App. A-14).

Finally, the court held the state court petition did not state a removable case under the general removal statute which would trigger the thirty-day time limit in 28 U.S.C. § 1446(b), because the allegations were susceptible of two reasonable interpretations concerning whether the plaintiffs were claiming their injuries occurred exclusively within the territorial limits of TAFB. 851 F.Supp. at 825 (Pet. App. A-11-12). The court concluded that only upon receipt of plaintiffs' interrogatory answers were "the defendants without doubt provided notice that the case was removable," and that the interrogatory answers constitute "other papers" within the scope of § 1446(b). *Id.* (Pet. App. A-12-13).

The court also held that the state court petition did not reveal a case removable under § 1442(a)(1). One of the essential elements for a colorable governmental contractor defense, the required "nexus between the acts [GE] performed at the direction of the Secretary of the Air Force and the present claim for relief," 851 F.Supp. at 823 (Pet. App. A-8), was not apparent until GE received the plaintiffs' interrogatory answers. *Id.*, at 825, n. 5. (Pet. App. A-13 n. 5). The court then rejected a claim that removal had been waived on the basis of the filing of a motion for summary judgment by one of the original defendants, Chemical Specialists and Development, Inc., because the basis to remove had not been disclosed by plaintiffs' interrogatories at the time the motion was filed in state court, and hence no knowing waiver of the right to remove could have been made at the time the motion for summary judgment was filed. *Id.*, (Pet. App. A-13-14).

The original plaintiffs sought a writ of mandamus from the Fifth Circuit Court of Appeals to obtain review

of the order denying their motion to remand. The writ was denied in an unpublished order on July 28, 1994. Resp. App. 52. The original plaintiffs also sought reconsideration of the order denying their motion to remand once the case was transferred to the United States District Court for the Western District of Oklahoma, but this motion was also denied on August 12, 1994. (Pet. App. A-19-20).

C. Post-Removal Proceedings In Federal District Court.

Then on October 3, 1994, the original plaintiffs filed, ***voluntarily*** and with leave of court, a fourth amended complaint, ***adding 85 new defendants, including the respondents.*** Resp. App. 53-97. On December 7, 1994, 160 *additional* Oklahoma residents, who were present or former employees of the Air Force at TAFB, filed a complaint in intervention which contained the same allegations which were made in the fourth amended complaint. Resp. App. 98-156.

After dismissals of most defendants pursuant to settlement agreements or otherwise, the claims of the original and intervening plaintiffs were eventually limited to the respondents, none of which had been parties in the Texas state court. As to respondents, petitioners claimed that "they have central and peripheral nervous system and other specified disorders as a result of exposure through inhalation and dermal absorption of certain substances contained in products manufactured or supplied by" respondents for use at TAFB. Resp. App. 157. The alleged exposures occurred while the plaintiffs were

employed by the Air Force in aircraft maintenance positions in Building 3001 at TAFB. *Id.* Respondents were alleged to be liable because they "breached their duty to warn potential users [of their products] of the dangerous propensities of these chemicals even though the chemicals supplied were not improperly manufactured or contaminated." *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1037 (10th Cir. 1998) (Pet. App. A-33).

After discovery, respondents moved for summary judgment because the undisputed evidence established that the Air Force, as the employer of petitioners, actually knew or should have known of the potential hazards to petitioners of exposure to the products which respondents allegedly supplied to TAFB. Thus, as a matter of law respondents did not owe petitioners or their employer any duty to warn of such potential hazards. Resp. App. 158. On December 13, 1996, the motion for summary judgment was granted. The court found respondents "have supplied a lengthy, detailed and well-supported list of undisputed facts which have not been controverted by plaintiffs." Resp. App. 158. The court concluded respondents did not have a duty under Oklahoma law to warn petitioners or their employer, the Air Force, of dangers about which the Air Force either had actual knowledge or about which it should have known. Resp. App. 161.[4] The "federalized" Oklahoma law

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[4] Pursuant to 16 U.S.C. § 457 federal law is applicable to this personal injury action arising on a federal enclave and incorporates Oklahoma substantive law because the alleged injuries occurred on a federal enclave surrounded by the state of Oklahoma. *Stewart & Co. v. Sandrakula*, 309 U.S. 94, 100 (1940); *Vasina v. Grumman Corp.*, 644 F.2d 112, 116-117 (2d Cir. 1981);

recognizes the so-called "sophisticated or knowledgeable purchaser" doctrine: a product seller is under no duty to warn a purchaser of its products or the purchaser's employees of potential dangers associated with the use of or exposure to the product which are actually known to the purchaser or about which the purchaser should have knowledge. *Duane v. Oklahoma Gas & Electric Co.*, 833 P.2d 284, 286-287 (Okla. 1992); *Marker v. Universal Oil Products Co.*, 250 F.2d 603, 606-607 (10th Cir. 1957); and *Mayberry v. Akron Rubber Machinery Corp.*, 483 F.Supp. 407, 413 (N.D. Okla. 1979). In granting summary judgment the district court applied this law. Resp. App. 160-162.

D. Post-Removal Appeal.

Petitioners appealed to the Tenth Circuit Court of Appeals, contending error in the denial of the motion to remand filed by the original 126 plaintiffs. Petitioners also asserted that a genuine issue of material fact existed concerning the knowledge of the Air Force, as the employer of petitioners, of the potential dangers of exposure to the products of respondents. Resp. App. 168-170; *Akin v. Ashland Chemical Co.*, 156 F.3d at 1033 (Pet. App. A-24). Petitioners sought to have the judgment for respondents vacated on two grounds: that proceedings in the district court were a nullity because removal was improper even though respondents were not sued prior to removal and many plaintiffs were also not parties to

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Burgio v. McDonnell Douglas, Inc., 747 F.Supp. 865, 867 (E.D. N.Y. 1990); *Voelkel v. General Motors Corp.*, 846 F.Supp. 1468, 1473 (D. Kan. 1994); and *Quadrini v. Sikorsky Aircraft Division*, 425 F.Supp. 81, 84-88 (D. Conn. 1977).

the state court action; and that summary judgment was inappropriate because of a disputed material fact. Accordingly, petitioners requested the court of appeals to remand the case against respondents to a Texas state court in which respondents had never been sued, and in which the 160 intervening plaintiffs had never chosen to sue. *See* Resp. App. 167.

Noticeably absent from the appeal was any contention that substantive grounds for removal pursuant to 28 U.S.C. § 1441 or § 1442(a)(1) did not exist. Indeed, at the heart of the removal argument on appeal was the assertion that "the initial pleading [in state court] . . . affirmatively revealed on its face grounds for removal existed under either/both of GE's asserted grounds for federal jurisdiction: federal enclave and federal officer." Resp. App. 171. According to the petitioners, grounds for removal were clear: "appellants assert that the Petition was crystal clear on its removability." Resp. App. 172.

The court of appeals rejected each ground of error, and affirmed summary judgment. The court commenced its discussion with an explicit determination that federal enclave jurisdiction existed, noting that "[t]here is no dispute that Tinker Air Force Base at Oklahoma City, Oklahoma is such a federal enclave." 156 F.3d at 1034 (Pet. App. A-25). The court then addressed the first alleged defect in the removal, "that the removal petition was defective in that all co-defendants did not consent and join in the removal papers." *Id.* Adopting what is the unanimous view of other courts, the court held that removal under § 1442(a)(1) does not require consent of any defendant to removal by a federal officer or a person acting under a federal officer. 156 F.3d at 1034-1035 (Pet.

App. A-26-27). A related argument, that one defendant could not lawfully consent to removal "because it had previously filed a motion for summary judgment in state court, which motion was pending when removal was granted," was also rejected. 156 F.3d at 1036 (Pet. App. A-30-31). The court concluded the moving defendant in state court, Chemical Specialists, was not precluded from consenting to removal "because actions in state court by defendant Chemical Specialists in this case were taken before it was unequivocally apparent that the case was removable." 156 F.3d at 1036 (Pet. App. A-30-31). Thus, the court adopted the principle "that a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to remove in the absence of adequate notice of the right to remove." *Id.* (Pet. App. A-31).[5]

Next, the court addressed the argument that removal was untimely because the initial pleading provided defendants with all necessary information to ascertain removability. The court agreed with the conclusion of the district court, in denying the motion to remand, "that the

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[5] Although the court of appeals did not cite the district court's opinion on this issue, the court of appeals agreed with the reasoning of the district court. *See Akin v. Big Three Industries, Inc.*, 851 F.Supp. at 825-826 n. 5 (Pet. App. A-19). The holding of both courts accords with the prevailing authority. *E.g., McKnight v. Illinois Central Railroad*, 967 F.Supp. 182, 186 (E.D. La. 1997); *Fain v. Biltmore Securities, Inc.*, 166 F.R.D. 39, 41 (M.D. Ala. 1996); *Bedell v. H.R.C., Ltd.*, 522 F.Supp. 732, 738 (E.D. Ky. 1981); and *Estate of Krasnow v. Texaco, Inc.*, 773 F.Supp. 806, 809 (E.D. Va. 1991). Of course, whether Chemical Specialists did or could consent was relevant only to removal under 28 U.S.C. § 1441 as § 1442(a)(1) does not require consent of all defendants.

initial pleading in this case was ambiguous in that it did not provide unequivocal notice of the right to remove, and the first clear notice of removability was given in answer to an interrogatory." 156 F.3d at 1035 (Pet. App. A-29). Citing its own precedent, the court concluded that 28 U.S.C. § 1446(b) requires that the basis for removability " 'ought to be unequivocal' " and " 'should not be ambiguous.' " 156 F.3d at 1035 (Pet. App. A-30), quoting from *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489-490 (10th Cir. 1979). Thus, the court "requires clear and unequivocal notice from the pleading itself, or a subsequent 'other paper' such as an answer to interrogatory." 156 F.3d at 1036 (Pet. App. A-30).

Necessarily, the conclusion that removal was timely, based upon GE's receipt of an interrogatory answer, resulted in the rejection of the argument of petitioners, based upon some district court cases "to the effect that where it is apparent that removal ***may*** be justified a duty is imposed upon movants to investigate potential reasons for removal." 156 F.3d at 1035 n. 2 (Pet. App. A-27 n. 2) (emphasis by the court). "We disagree with cases from other jurisdictions which impose a duty to investigate and determine removability where the initial pleading indicates that the right to remove ***may*** exist." 156 F.3d at 1036 (Pet. App. A-30) (emphasis by the court).

The court concluded its analysis of the removal issue with a discussion of the effect of the voluntary amendment of the complaint by the original plaintiffs and the federal court intervenors to add respondents and others as defendants in federal court after removal. Adopting the unanimous view of other courts of appeal, the Tenth Circuit held "that plaintiffs cannot voluntarily invoke,

and then disavow, federal jurisdiction." 156 F.3d at 1036 (Pet. App. A-31). In so holding the court adopted the reasoning and language of *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984), in addressing the effect of a voluntary amendment in federal court by a plaintiff whose case was involuntarily removed to federal court:

> "But once [plaintiff] decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there. Otherwise he would be in a position where if he won his case on there [sic] merits in federal courts he could claim to have raised the federal question in his amended complaint voluntarily, and if he lost he could claim to have raised it involuntarily and to be entitled to start over in state court. He 'cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses.' "

156 F.3d at 1037 (Pet. App. A-31-32), quoting from *Bernstein*, 738 F.2d at 185-186.[6]

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[6] In support of this decision the court also cited *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 56 (2d Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 n. 2 (6th Cir. 1995); and *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 42 (5th Cir. 1989). In support of the conclusion it reached, the court of appeals could have but did not cite the following additional cases: *Brough v. United Steel Workers of America, A.F.L.-C.I.O.*, 437 F.2d 748, 749-750 (1st Cir. 1971); *Cades v. H&R Block, Inc.*, 43 F.3d 869, 873 (4th Cir. 1994); *Citizens Marine National Bank v. U. S. Department of Commerce*, 854 F.2d 223, 226 (7th Cir. 1988); *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 546-547 (5th Cir. 1990); and *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 697 n. 3 (6th Cir. 1996).

Even if petitioners did not waive the alleged defects in the removal procedure, the admitted and undisputed existence of

Having rejected all arguments to undo the proceedings in federal court against respondents who had never been sued in state court, the court of appeals finally addressed the merits of petitioners' claims. The court concluded that "[b]ecause of the wealth of research available, the ability of the Air Force to conduct studies, and its extremely knowledgeable staff, we find that the Air Force easily qualifies as a 'knowledgeable purchaser' that should have known the risks involved with low-level chemical exposure." 156 F.3d at 1037 (Pet. App. A-35). Thus, "[e]mployees of the Air Force are also deemed to possess the necessary level of sophistication, so that defendants had no duty to warn the Air Force or its employees of the potential hazards." *Id.*

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The only "compelling reason" offered by petitioners for the Court's consideration of the petition is couched in the language of Supreme Court Rule 10(c): the tendered issue "is an important question of federal law that has not been, but should be settled by the court." Pet. at 15. This

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federal question jurisdiction for their claim against respondents at the time judgment was rendered against respondents, would have precluded petitioners' attempt "[t]o wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements." *Caterpillar, Inc. v. Lewis*, 519 U.S. ___, 117 S.Ct. 467, 477, 136 L.Ed.2d 437, 452 (1996). Such an attempt "would impose an exorbitant cost on our dual court system – a cost incompatible with the fair and unprotracted administration of justice." *Id.*

assertion is incorrect and the Court's discretion should not be exercised to consider the issue presented in the petition because the question presented:

(1) is hypothetical and requests an advisory opinion;

(2) cannot lead to a change in result since the court of appeals based the same decision on an independent ground which petitioners do not challenge;

(3) invites the Court to engage in fact determinations; and,

(4) has not been the subject of conflict in the circuits and is not sufficiently important for the Court's review.

A. Petitioners Waived Any Defect In Removal By Suing Respondents In Federal Court After Removal. Consequently, The Question Presented Is Hypothetical And The Petition Requests An Advisory Opinion.

The first, and the most fundamental, reason the petition should be denied is that the issue of whether the time to remove should run whenever the removing defendant can be shown to possess information, ***not*** discoverable from the initial pleading or a subsequent "other paper," that a case is removable, is purely hypothetical. The Court does not, of course, sit to render advisory opinions upon abstract propositions which will not affect the outcome in ***any*** way. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Zacchini v. Scripts-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969); *Hodges v. United States*, 368

U.S. 139, 140 (1961); *Smith v. Butler*, 366 U.S. 161 (1961); *Piccirillo v. State of New York*, 400 U.S. 548, 549 (1971).

The winding path the case has followed to this Court was described earlier in detail, primarily to demonstrate the hypothetical nature of the issue presented by the petitioners, and the advisory opinion which they are requesting in their petition. Regardless of the merits of the petitioners' argument concerning when the removal time begins to run, resolution of the issue favorably to petitioners would not alter the outcome of the case. The court of appeals held, as has every other circuit to address the issue, that the voluntary amendment of the complaint in federal court to add new parties (or claims) within the court's original jurisdiction, after an allegedly untimely removal, precluded the assertion of the untimeliness of the removal (or the other alleged procedural defects) once the petitioners failed on the merits of their claim. (Pet. App. A-31-32). Petitioners have not challenged that holding, which is thus final and provides an independently sufficient basis for the Tenth Circuit's rejection of petitioners' objections to removal. The propriety of the Tenth Circuit's affirmance of the district court's denial of the motion to remand for untimely removal is thus not challenged under the question presented; petitioners raise only an abstract question, and certiorari should consequently be denied.

Moreover, the adoption of such an argument on this record would result in the respondents being sent to a state court in which they were never sued, to defend a case they won on the merits in a federal court where they

were sued, and to drag along 160 plaintiffs who intervened in the federal court case but never chose to initiate litigation in state court.

The hypothetical nature of the issue presented is also apparent from a consideration of an alternative argument advanced by respondents to support the appellate court's conclusion that petitioners waived defects in the removal. In *Caterpillar, Inc. v. Lewis*, 519 U.S. ___, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) the Court held that the absence of complete diversity at the time of removal, to which the plaintiff timely objected, did not invalidate the subsequent federal court judgment for the removing defendant because complete diversity existed when the judgment was rendered. The same "considerations of finality, efficiency, and economy," 117 S.Ct. at 476, that led the Court to refuse to invalidate the judgment in *Caterpillar*, despite *Caterpillar*'s failure to satisfy the requirement in 28 U.S.C. § 1441(a) "that the case be fit for federal adjudication at the time the removal petition is filed," 117 S.Ct. at 475, are of equal application in this case. Federal question jurisdiction existed when the judgment was rendered for respondents. Thus, any alleged procedural defects in the removal procedure, including untimeliness, or even a lack of jurisdiction at the time of removal (which petitioners do not assert here or before the court of appeals), should not undo the judgment in a fully adjudicated case.[7]

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[7] Petitioners admitted below that federal question jurisdiction existed when summary judgment was entered. Resp. App. 171-174.

B. The Issue Presented Requires Evaluation Of Factual Issues.

The second reason the petition should be denied is that, at best, the question of what knowledge GE possessed concerning the removability of the case when it received the initial pleading, excluding the pleading itself, is inherently a factual issue. The Court has historically declined to exercise its discretion to consider arguments that turn essentially on factual determinations. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 537 (1957) (Justice Frankfurter dissenting); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918).

The petition discloses the inherently factual nature of the issue:

> From the interrogatories propounded by GE, the employee affidavit, counsel's statements at the hearing and the Third-Party Complaint, it is clear that GE knew at the time the original petition was served on it in December, 1992, that the case was removable under either the federal enclave or federal agent jurisdiction.

Pet. at 11. Whether "it is clear that GE knew" that the case was removable is, as this passage implicitly assumes, an issue of fact, based upon inferences to be drawn from the interrogatories submitted to the plaintiffs by GE, the affidavit of the GE employee submitted in connection with the notice of removal, the statements of counsel for GE at the hearing on the motion to remand, and the motivations for the filing of a third party complaint by GE. Such complicated questions of fact are not only historically

disfavored by this Court, the fact-intensive test petitioners argue for would greatly magnify uncertainty about when removal time begins to run where there is now relative certainty based on the express language of the removal statutes.

C. The Issue Presented Does Not Concern A Significant Question Of Law.

Finally, the petition should be denied because the issue is not sufficiently important for the Court's discretionary review. Petitioners do not assert a conflict in the circuits on the issue presented because no court of appeals has ever adopted their argument. The closest appellate opinion, on the related and often uncertainly pled issue of amount in controversy in a diversity case, is *Chapman v. Powermatic, Inc.*, 969 F.2d 160 (5th Cir. 1992). There, the court stated:

> We have found no circuit court opinions that address whether a defendant is under a duty to exercise due diligence in determining the amount in controversy when the initial pleading does not reveal such an amount, and the district court opinions addressing this question are in disagreement.

Id., at 162.

The Fifth Circuit went on to reject a "due diligence" standard for determining the amount in controversy:

> We . . . conclude that for the purposes of the first paragraph of § 1446(b) the thirty day time period in which a defendant must remove a case starts to run from defendant's receipt of the

> initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount of the federal court. We adopt this rule because we conclude that it promotes certainty and judicial efficiency by not requiring courts to inquire into what a particular defendant may or may not subjectively know. The rule . . . which Chapman proposes that we adopt, in contrast, would needlessly inject an uncertainty into a court's inquiry as to whether a defendant has timely removed a case, and as a result would require courts to expend needlessly their resources trying to determine what the defendant knew at the time it received the initial pleading and what the defendant would have known had it exercised due diligence.

969 F.2d at 163.

The petition for certiorari, by omission, acknowledges that the issue presented has not precipitated any debate at the appellate level. Moreover, none of the cases cited in the petition address the issue of whether removal in the technical federal enclave and federal officer areas should be triggered by a defendant's knowledge of its internal activities.

D. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* Distinguished.

The petitioners' attempt to analogize this case to *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, No. 97-1909 (Sup. Ct. Oct. Term 1998) is unavailing. Certiorari was granted in *Murphy Brothers* to determine whether the

Eleventh Circuit was correct in its adoption of the "receipt rule" interpretation of the requirement in 28 U.S.C. § 1446(b) that notice of removal be filed "within thirty days after receipt by the defendant through service or otherwise of a copy of the initial pleading." *See, e.g.*, Brief of Petitioner at 10-11, in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, No. 97-1909 (S.Ct. Dec. 22, 1998), 1998 WL 890115 at *6. This issue presumes the initial pleading discloses a removable case. However, in this case, petitioners do not rely, in this Court, upon the allegations of the initial pleading to trigger removal, and the courts below determined as a fact that the initial pleading did not state a removable case. The issue in *Murphy Brothers* is purely one of statutory construction, whereas in this case the Court is asked to determine whether various acts of GE establish, as a fact, that GE possessed knowledge of the removability of the case when GE was served with process and the state court petition.

The issue in *Murphy Brothers* has also received significant attention at the circuit court level, whereas the only appellate level opinion to consider an issue even remotely related to the one tendered in this case, rejects an argument similar to that made by petitioners. Finally, and most importantly, the issue in *Murphy Brothers* was clearly presented to the district court and then to the court of appeals as a certified interlocutory order pursuant to 28 U.S.C. § 1292(b). *See Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396, 1397 (11th Cir. 1997). Here, the court of appeals ruled the removal issue was waived when the petitioners voluntarily sued respondents in federal court after the allegedly untimely

removal. Consequently, there is only a peripheral similarity between *Murphy Brothers* and this case, and *Murphy Brothers* adds nothing to the reasoning process as to whether certiorari should be granted here.

CONCLUSION

The petition should be denied because petitioners waived all asserted errors in the determination of timeliness of the removal when they voluntarily sued the respondents in federal court after removal, and thereafter lost the case against respondents on the merits, at a time when federal jurisdiction admittedly existed. Thus, the issue tendered in the petition is hypothetical and any consideration of it would be purely advisory. The petition should also be denied because the issue it tenders requires a weighing of evidence concerning the state of mind of a defendant and is not a significant issue which warrants the Court's time and consideration.

Respectfully submitted,

MORT G. WELCH
WELCH, JONES & SMITH
2601 Northwest Expressway
601 Oil Center West
Oklahoma City, OK 73112
(405) 848-2000
(405) 848-2029 (Facsimile)

Counsel for Respondent McGean-Rohco, Inc.

CLYDE A. MUCHMORE
KELLEY C. CALLAHAN
CROWE & DUNLEVY, A P.C.
20 N. Broadway Avenue
1800 Mid-America Tower
Oklahoma City, Oklahoma 73102-8273
(405) 235-7700
(405) 272-5221 (Facsimile)

Counsel for Respondents Ashland Chemical Company and Dow Chemical Company

CAUSE NO. _____

JAMES E. AKIN, RICHARD G.	§	IN THE
ARELLANO, TERRI R.	§	DISTRICT
ARMSTRONG, CHARLES L.	§	COURT OF
BALDWIN, ANNIE M. BARNES	§	
FREDDIE BEVERS, TERRY D.	§	
BLAIN, MARCIA BRANNOCK,	§	
DELTON E. BROWN, TIMOTHY L.	§	
CARAWAY, ELWOOD CLARK,	§	
THOMAS W. CLARK, RICHARD	§	
COTEY, CONNIE COTTRELL,	§	
RONNIE D. COTTRELL, STEVEN	§	
L. COY, HUGH CROW, VIRGIL	§	JEFFERSON
CRUMP, NATHAN D'AMICO,	§	COUNTY,
EDDIE R. DANNA, JR., AUDREY	§	TEXAS
L. DAVIS, DONNA M. DAVIS,	§	
LOUIS R. DICKINSON, OLLIE	§	
DILLISHAW, JR., DANNY L.	§	
DUNN, JENNY L. DUREN, BILL	§	
R. DURINGTON, STEPHEN RAY	§	
DUTY, LEON EALON, NOLA D.	§	
ELLZEY, DEBRA M. EMERICH,	§	
JANETTE K. FARLEY, PAUL	§	
FIELDS, DAVID R. FREESE,	§	
PATRICIA FROST, JON G.	§	
GABBARD, LINDA D. GATEWOOD,	§	
CAROLINE L. GENZER, JEFFREY	§	
A. GEORGE, MAX R. GLOVER,	§	
WENDELL P. GOMEZ, JOHN C.	§	
GOULD, PHYLLIS J. GOULD,	§	
REGINA G. GRISSAM, DENORAH	§	
L. HALL, PHYLLIS HALL, JOHN	§	
PETER HANNER, KENNETH O.	§	
HART, MICHAEL HAWKINS,	§	
EDGAR HOUSTON, VALENCIA	§	___ JUDICIAL
HOWELL, RALPH V. ICE, GARY P.	§	DISTRICT

IMPSON, ERIC L. JANOUSEK, §
JAMES DALE JONES, DAVID §
KEISER, CURT A. KINDER, BILLY §
B. KING, ALLAN LARSEN, LEORA §
LEWIS, LARRY D. LIDELL, §
ROBERT C. LOVE, WILLIE McNEAL, §
JACK L. MANNING, THOMAS §
MARSHALL, PAUL C. MEHAFFEY, §
RAMONA B. MELLINGER, DAVID §
L. MOORE, MICHAEL D. MOWLES, §
JEFFREY MURRAY, MELVIN E. §
NORTON, ZENEPHOR §
OVERSTREET, JAMES M. OWEN, §
TERRY W. OXLEY, RONALD K. §
PEOPLES, MICHAEL PHILLIPS, §
DARRYL A. PIERCE, MARIE L. §
PLUMLEE, PHILLIP PLUMLEE, §
RICK REAMES, JACK D. RHODEN, §
OTHA L. RHODEN, WAYNE §
RICHARDSON, GEORGE ROBERTS, §
NORMA ROBERTS, CHARLON S. §
ROGERS, SANDRA ROLLAND, §
TERRY ROLLINGS, MARLYS RONE, §
JUDY A. ROWLAND, TONY E. §
RUBLE, REATHA R. SCHLEGEL, §
GLORIA SHELTON AS §
REPRESENTATIVE OF THE ESTATE §
OF WILTON F. SHELTON, §
DECEASED, CHARLIE SHEPPARD, §
HERMAN D. SIKES, WILLIAM D. §
SLATTERY, MARK DAVID §
SPOELSTRA, CLAYTON D. §
STATSNY, MELISSA C. STATSNY, §
GAYLA S. STATON, VALERIE §
STEVENSON, ELLA S. STIVERS, §
MARTHA J. STOROZYSZYN, RICK §
L. STUART, MIKE SULLIVAN, §

ROBERT E. TEMPLIN, EMMETT THOMAS, JR., TOMMY L. TILLEY, BENJAMIN TINGLE, MARILYN J. TRACEY, VERNON L. UNSELL, RICARDO VALDEZ, LORETTA S. VERNON, HELEN WALKER, GARY WATSON, RANDY F. WIENS, LEONARD WILLIAMS, MORTEN D. WILLIAMS, PAUL J. WILLIAMS, GLENDA WRIGHT, HERMAN DALE WRIGHT, KENNETH L. WRIGHT, RONNIE WRIGHT, ALBERTA A. WYATT, JAMES D. WYATT, AND JOHNNIE R. YORK	§
VS.	§
BIG THREE INDUSTRIES, INC., CHEMICAL SPECIALISTS & DEVELOPMENT INC., E. I. DUPONT de NEMOURS & COMPANY, INC., GENERAL ELECTRIC COMPANY, GTE PRODUCTS CORP., HAYNES INTERNATIONAL, INC., JESSOP STEEL COMPANY, J. W. HARRIS CO., INC., METALLURGICAL TECHNOLOGIES INC., PRATT & WHITNEY COMPANY, INC., THUNDERBIRD SALES COMPANY, UNION CARBIDE CHEMICALS & PLASTICS COMPANY, INC.	§

PLAINTIFFS' ORIGINAL PETITION

(Filed Nov. 13, 1992)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs, and files this their Original Petition complaining of the actions of Defendants, and for

cause of action would respectfully show unto the Court as follows:

I.

Plaintiffs are residents of the State of Oklahoma.

II.

Defendant, Big Three Industries, Inc. is a Delaware Corporation with its principal place of business in Texas and may be served by serving its registered agent, Corporate Service Company, 100 Congress Avenue, Suite 1100, Austin, Texas, 78701, by certified mail, return receipt requested.

Defendant, Chemical Specialists & Development Inc. is a Texas Corporation and may be served by serving its registered agent, Steven R. Cooke, P. O. Box 687, Conroe, Texas 77305, by certified mail, return receipt requested.

Defendant, E. I. DuPont de Nemours Company, Inc. is a Delaware Corporation and may be served by serving its registered agent, C. T. Corporation System, 350 North St. Paul Street, Suite 2900, Dallas, Texas 75201, by certified mail, return receipt requested.

General Electric Company is a New York Corporation and may be served by serving its registered agent, C. T. Corporation System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201, by certified mail, return receipt requested.

Defendant, GTE Products Corp. is a Massachusetts Corporation and may be served by serving its registered

agent, C. T. Corporation System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201, by certified mail, return receipt requested.

Defendant, Haynes International, Inc. is a Delaware Corporation and may be served by serving its registered agent, C. T. Corporation System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201, by certified mail, return receipt requested.

Defendant, Jessop Steel Company is a Pennsylvania Corporation and may be served by serving its registered agent, Prentice Hall Corporation System, 400 N. St. Paul Street, Dallas, Texas 75201, by certified mail, return receipt requested.

Defendant, J. W. Harris Co., Inc is an Ohio Corporation and may be served by serving its registered agent, C. T. Corporation System, 350 N. St. Paul Street, Suite 2900, Dallas, Texas 75201, by certified mail, return receipt requested.

Defendant, Metallurgical Technologies Inc. is a Texas Corporation and may be served by serving its registered agent, James B. Huddleston, 14436 Max Road, Pearland, Texas 77581, by certified mail, return receipt requested.

Defendant, Pratt & Whitney Company Inc. is a foreign corporation doing business in the state of Texas. Pratt & Whitney Company Inc. has not designated a registered agent and as such may be served by serving the Secretary of State by certified mail, return receipt requested. The Secretary of State will forward the service to Richard R. Burkhart, 1289 Blue Hills Ave., Bloomfield,

Connecticut 06002, pursuant to Texas Civil Practice and Remedies Code $ 17.044.

Defendant, Thunderbird Sales Company is a foreign corporation doing business in the State of Texas. Thunderbird Sales Company has not designated a registered agent and as such may be served by serving the Secretary of State by certified mail, return receipt requested. The Secretary of State will forward the service to William F. Ritchie, P. O. Box 30078, Oklahoma City, Oklahoma 73140, pursuant to Texas Civil Practice and Remedies Code $ 17.044.

Defendant, Union Carbide Chemicals & Plastics Company, Inc. is a New York Corporation and may be served by serving its registered agent, C. T. Corporation System, 811 Dallas Avenue, Houston, Texas 77002, by certified mail, return receipt requested.

III.

Venue is proper in Jefferson County, Texas pursuant to § 15.037 of the Texas Civil Practices & Remedies Code in that one or more of Defendants are foreign corporations with an agent or representative in Jefferson County, Texas.

IV.

Plaintiffs are compelled to bring this action because of the personal injuries and damages of Plaintiffs herein for toxic chemical exposure. Plaintiffs would show that all Plaintiffs were exposed to hazardous chemicals,

including, but not limited to cobalt, chrominum, cadmium, acetylene, ethanol and heptane while working for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiffs would show that said chemicals were manufactured or provided by one or more of the named Defendants. Plaintiffs would further show that General Electric Company and Pratt & Whitney Company Inc. provided jet engines to Tinker Air Force Base which were worked on by the above-referenced Plaintiffs. Each Plaintiff listed above was exposed to the dust and fumes of the jet engine and jet engine parts. These Plaintiffs worked on the jet engines by grinding, reworking, and being generally exposed to the chemicals produced by the jet engines and jet engine parts. The jet engines emitted a significant amount of cobalt, chromium and cadmium during the grinding, reworking and otherwise modification of the engines, which were some of the chemicals responsible for these Plaintiffs' damages. Plaintiffs were also exposed to numerous other hazardous chemicals while working at the air force base.

V.

Plaintiffs would show that each of the above-referenced Plaintiffs have been employed at Tinker Air Force Base and were exposed to significant amounts of chemicals. Plaintiffs were exposed to the chemicals without any warning of the true dangerous nature of said chemicals and their potential for causing adverse health effects upon humans exposed to them, particularly over a long period of time. Plaintiffs would show that such chemicals, named above, were designed, formulated, manufactured and distributed by the above-named Defendants;

and they violated the terms and provisions of Section 402a and 402b of the Restatement of Torts (2nd).

VI.

The Defendants also breached the expressed and implied warranties of fitness and merchantability with respect to said products in that the products were not fit for the purpose intended; and in other respects were such that the Defendants were liable under principles and concepts of strict product liability. The aforesaid conditions, defects and breaches of warranty were a proximate and/or producing cause of the injuries to all Plaintiffs.

VII.

Plaintiffs would further show that said Defendants were negligent in the manner in which they designed, formulated, manufactured and marketed said chemicals as well as the jet engines manufactured, designed and formulated by General Electric Company and Pratt & Whitney Company Inc.; and that they were further negligent in the manner in which they failed to properly test said chemicals and jet engines before placing them in the hands of Tinker Air Force Base employees; they were further negligent in failing to warn and instruct the individuals working at Tinker Air Force Base, Plaintiffs herein, of the proper way to cope with said chemicals and/or the proper way to protect one's body against said chemicals and/or the toxicity of said chemicals and/or means of preventing health effects caused by those chemicals and working around the chemicals; how to utilize prophylactic gear; and how, in other respects, to either

eliminate or reduce the hazards from exposure to said chemicals. That such negligence was a proximate cause of the exposure in question and the ensuing damages.

VIII.

By the negligent actions as described in paragraph VI, these Defendants negligently inflicted mental distress on these Plaintiffs. Plaintiffs plead a cause of action for negligent infliction of mental distress.

IX.

Plaintiffs would further show that by reason of the exposure of the Plaintiffs to such chemicals, they were caused to suffer and sustain irreversible brain damage, liver disease, tumors, and other damages to their body and person.

X.

Plaintiffs would further plead a cause of action for fear of brain disorders, cancer, and other diseases as a result of the exposure to the above-referenced chemicals.

XI.

Plaintiffs further sue all Defendants for the physical pain and suffering that Plaintiffs have suffered as a result of the injuries they sustained. Additionally, Plaintiffs sue for recovery of damages herein for physical pain and suffering which they will endure for the remainder of

their lives in an amount in excess of the minimum jurisdictional limits of this Court.

XII.

Plaintiffs would show that they sustained mental anguish of an almost incalculable nature including the obvious mental anguish which necessarily accompanies any type of brain disorder, and fear of contracting brain disorders, cancer and other diseases as a result of their exposure to the above-referenced chemicals. Plaintiffs also sue all Defendants for the mental anguish they will suffer for the remainder of their lives in an amount in excess of the minimum jurisdictional limits of this Court. Accordingly, Plaintiffs will request that the jury consider a sum of money which will reasonably compensate Plaintiffs for their damages resulting from the occurrence in question as follows:

1) Physical pain which the Plaintiffs have suffered up until the time of trial;

2) Mental anguish which the Plaintiffs have suffered up until the time of trial;

3) Reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question;

4) Loss of earnings which Plaintiffs have sustained up until the time of trial;

5) Physical impairment which Plaintiffs have suffered up until the time of trial;

6) Disfigurement which Plaintiffs have suffered up until the time of trial.

XIII.

The jury will be asked to consider the following elements of damages which Plaintiffs will sustain in the future from the time of trial as a result of the incident made the basis of this lawsuit, subject to Plaintiffs' proof by preponderance of the evidence:

1) Physical pain and suffering which Plaintiffs will, in reasonable probability, suffer in the future;

2) Mental anguish which Plaintiffs will, in reasonable probability, suffer in the future;

3) Reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future;

4) The loss reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future;

5) The damages which result from the physical impairment which Plaintiffs will continue to suffer in the future and the inability to perform those tasks and services which they ordinarily would perform in the future;

6) The disfigurement which Plaintiffs will continue to suffer in the future.

XIV.

Therefore, Plaintiffs will prove upon trial of this cause, they have sustained damages as a direct and proximate result of the negligence of Defendants herein and/or the violations of the applicable products liability laws

were a producing and or proximate result of such damages and request that judgment be entered against all Defendants in the amount proven at the time of trial.

XV.

Plaintiffs would show that Defendants were aware of the latent defects in their chemicals and jet engines. Therefore, this conscious decision to permit the chemicals and jet engines to be used by workers at Tinker Air Force Base without adequate warnings or precautions constitutes a wanton, willful disregard for the rights of Plaintiffs which renders Defendants liable to Plaintiffs for exemplary damages. The amount of exemplary damages is in excess of the minimum jurisdictional limits of this Court.

XVI.

Plaintiffs further claim prejudgment interest at the maximum rate allowed by law.

XVII.

Plaintiffs' damages sought herein exceed the minimum jurisdictional amounts necessary to place jurisdiction on this Honorable Court and all damages sought against all Defendants.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein as the law directs, and that upon final hearing, Plaintiffs have and recover judgment of and from the Defendant, both jointly and severally, in the sum in

excess of the minimum jurisdictional amounts of this Court, in addition to costs of court, prejudgment and post-judgment interest which may be authorized by law, and the Plaintiffs have such other and further relief, both general and special, at law and in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

WELLER, WHEELUS & GREEN
550 Fannin, Suite 500
Beaumont, Texas 77701
(409) 838-0101
(409) 838-6780 (Fax)

BY /s/ Mitchell A. Toups
MITCHELL A. TOUPS
State Bar No. 20151600
B. ADAM TERRELL
State Bar No. 19790900

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff respectfully requests a trial by jury.

BY /s/ Mitchell A. Toups
MITCHELL A. TOUPS

CAUSE NO. B 144,313

JAMES E. AKIN, RICHARD G.	§	IN THE
ARELLANO, CHARLES L.	§	DISTRICT
BALDWIN, ANNIE M. BARNES,	§	COURT OF
MARCIA BRANNOCK, DELTON	§	
BROWN, GARY BURWELL,	§	
TIMOTHY CARAWAY, THOMAS	§	
W. CLARK, DAVID CLAUSEN,	§	
RICHARD COTEY, CONNIE	§	JEFFERSON
COTTRELL, RONNIE D.	§	COUNTY, TEXAS
COTTRELL, STEVEN L. COY,	§	
HUGH CROW, NATHAN	§	
D'AMICO, EDDIE R. DANNA,	§	
JR., DONNA M. DAVIS,	§	
LEANDRA DEMOSS, ORVILLE	§	
DESHIELDS, LOUIS R.	§	
DICKINSON, OLLIE	§	
DILLISHAW, JR., DANNY	§	
DRISKILL, EDDIE DUCK, JR.,	§	
DANNY DUNN, JENNY L.	§	
DUREN, BILL R. DURINGTON,	§	
DORIS BROWN DURLIN,	§	
STEPHEN RAY DUTY, LEON	§	
EALON, LARRY ELLIOTT,	§	
DEBRA M. EMERICH, JANETTE	§	
K. FARLEY, LLOYD FREED, JON	§	
G. GABBARD, DEBRA HALL	§	
GABBARD, LINDA D.	§	
GATEWOOD, LANCE GILLEY,	§	
MAX R. GLOVER, WENDELL	§	
GLOVER, JAMES GOFF,	§	
WENDELL GOMEZ, JOHN C.	§	
GOULD, PHYLLIS J. GOULD,	§	
REGINA G. GRISSAM,	§	
KENNETH O. HART, MICHAEL	§	

HAWKINS, EDGAR HOUSTON, GERALD HOUSTON, VALENCIA HOWELL, RALPH V. ICE, RAY IRVAN, ERIC LJANOUSEK, DAVID KEISER, BILLY B. KING, LARRY D. LIDELL, DAVID LOVE, ROBERT C. LOVE, JIMMY LYNCH, THOMAS MARSHALL, JAMES MCLANE, MICHAEL D. MOWLES, JEFFREY MURRAY, MELVIN E. NORTON, ZENEPHOR OVERSTREET, JAMES M. OWEN, TERRY W. OXLEY, RONALD K. PEOPLES, MICHAEL PHILLIPS, LOUISE PICKARD, MARIE L. PLUMLEE, PHILLIP PLUMLEE, RICK REAMES, SARAH REESE, JACK D. RHODEN, OTHA L. RHODEN, WAYNE RICHARDSON, DOROTHY RIMBOLD, TIJUANA ROBINSON, ALINE ROCKWELL, CHARLON S. ROGERS, SANDRA ROLLAND, MARLYS RONE, TONY E. RUBLE, MARY SAYRE, REATHA R. SCHLEGEL, GLORIA SHELTON AS REPRESENTATIVE OF THE ESTATE OF WILTON F. SHELTON, DECEASED, CHARLIE SHEPPARD, HERMAN D. SIKES, TERRY SIMPSON,	§ § §

WILLIAM D. SLATTERY, LARRY SMITH, KENNETH SNYDER, JESS STANLEY, CLAYTON D. STASTNY, MELISSA C. STASTNY, GAYLE S. STATON, MARTHA J. STOROZYSZYN, RICK L. STUART, JAMES SYKES, EMMETT THOMAS, JR., BENJAMIN TINGLE, MARILYN J. TRACEY, GARY VESSELL, HELEN WALKER, WILLIAM WARD, NOREEN WELCH, GEORGE WEST, RANDY F. WIENS, LEONARD WILLIAMS, MORTEN D. WILLIAMS, LINDA WILLIS, GLENDA WRIGHT, HERMAN DALE WRIGHT, KENNETH L. WRIGHT, ALBERT A. WYATT, JAMES D. WYATT, JOHNNIE R. YORK,	§
	§
LOIS AYERS, GARY BLEDSOE, TERRY BRUNER, FLOYD BURSELSON, CHRISTY CANNON, MARK CHISHOLM, BILLIE COCHRAN, DELORES COLEY, VIRGIL W. CLARK, JAMES CROOM, MARY DODSON, SAUNDRA DUNCAN, JIMMY EASTON, DONALD FLATT, RANDELL GREEN, JAMES HENDERSON, DAVID HIGGINS, CATHY KALER, DEBRA KELLOGG, RUSSELL KINNEY, PHYLLIS KNOTT, LANDY LANCASTER, JERRY LUM,	§

JACK MCSWAIN, JAMES MESSICK, DANIEL MOODY, JACK OBLANDER, PATRICIA ORR, DAVID PARRIS, HELEN PAYNE, VIRGINIA PERRY, WINFRED PLUNKETT, DEBRA SANDERS, THOMAS SANDERS, ORIN SHAW, PAUL STEIN, ZEEFFIE SWANEGAN, ROBERT L. SWARTZ, GEORGE THORPE, LONNIE TRAMMEL, STANLEY WALKUP, PEGGY WALTON, CLINTON WILBURN, DANIEL WILLIAMS, RICHARD WILLIAMS, AND BARBARA YOTT §

DEBRA COY, DAVID DESELMS, WILLIAM DUNLAP, MARILYN GAITLYN, JIMMY GATEWOOD, FRANCES HINDS, LAVEDA MONTAGUE, FRED STOCKTON, RONALD WILLIAMS, AND ROSETTA WILLIAMS §

VS. §

BIG THREE INDUSTRIES, INC., CHEMICAL SPECIALISTS & DEVELOPMENT INC., E. I. DUPONT de NEMOURS & COMPANY, INC., GENERAL ELECTRIC COMPANY, GTE PRODUCTS CORP., HAYNES INTERNATIONAL, INC., JESSOP STEEL COMPANY, J. W. HARRIS CO., INC., METALLURGICAL §

TECHNOLOGIES INC., PRATT	§
& WHITNEY COMPANY, INC.,	§
THUNDERBIRD SALES	§
COMPANY, UNION CARBIDE	§
CHEMICALS & PLASTICS	§
COMPANY, INC., UNITED	§
TECHNOLOGIES	§
CORPORATION	§

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs, and files this their Second Amended Original Petition complaining of the actions of Defendants, and for cause of action would respectfully show unto the Court as follows:

I.

Plaintiffs are residents of the State of Oklahoma and are as follows:

James Akin, Richard Arellano, Charles Baldwin, Annie M. Barnes, Marcia Brannock, Delton Brown, Gary Burwell, Timothy Caraway, Thomas W. Clark, David Clausen, Richard Cotey, Connie Cottrell, Ronnie Cottrell, Steven L. Coy, Hugh Crow, Nathan D'Amico, Eddie R. Danna, Jr., Donna M. Davis, Leandra DeMoss, Orville DeShields, Louis R. Dickinson, Ollie Dillishaw, Jr., Danny Driskill, Eddie Duck, Jr., Danny Dunn, Jenny L. Duren, Bill R. Durington, Doris Brown Durlin, Stephen Ray Duty, Leon Ealon, Larry Elliott, Debra A. Emerich, Janette Farley, Lloyd Freed, Jon G. Gabbard, Debra Hall Gabbard, Linda D. Gatewood, Lance Gilley, Max R. Glover, Wendell

Glover, James Goff, Wendell Gomez, John C. Gould, Phyllis J. Gould, Regina Grissam, Kenneth O. Hart, Michael Hawkins, Edgar Houston, Gerald Houston, Valencia Howell, Ralph V. Ice, Ray Irvan, Eric L. Janousek, David Keiser, Billy B. King, Larry D. Liddell, David Love, Robert C. Love, Jimmy Lynch, Thomas Marshall, James McLane, Michael D. Mowles, Jeffrey Murray, Melvin E. Norton, Zenephor Overstreet, James M. Owen, Terry W. Oxley, Ronald K. Peoples, Michael Phillips, Louise Pickard, Marie L. Plumlee, Phillip Plumlee, Rick Reames, Saran Reese, Jack D. Rhoden, Otha Rhoden, Wayne Richardson, Dorothy Rimbold, Tijuana Robinson, Aline Rockwell, Charlon S. Rogers, Sandra Rolland, Marlys Rone, Tony E. Ruble, Mary Sayre, Reatha R. Schlegel, Gloria Shelton as Representative of the Estate of Wilton F. Shelton, Deceased, Charlie Sheppard, Herman D. Sikes, Terry Simpson, William D. Slattery, Larry Smith, Kenneth Snyder, Jess Stanley, Clayton D. Stastny, Melissa C. Stastny, Gayla S. Staton, Martha J. Storozyszyn, Rick L. Stuart, James Sykes, Emmett Thomas, Jr., Benjamin Tingle, Marilyn J. Tracey, Gary Vessell, Helen Walker, William Ward, Noreen Welch, George West, Randy F. Wiens, Leonard Williams, Morten D. Williams, Linda Willis, Glenda Wright, Herman Dale Wright, Kenneth L. Wright, Albert A. Wyatt, James D. Wyatt, Johnnie R. York, Lois Ayers, Gary Bleldsoe, Terry Bruner, Floyd Burelson, Christy Cannon, Mark Chisholm, Billie Cochran, Delores Coley, Virgil W. Clark, James Croom, Mary Dodson, Saundra Duncan, Jimmy Easton, Donald Flatt, Randell Green, James Henderson, David Higgins, Cathy Kaler, Debra Kellogg, Russell Kinney, Phyllis Knott, Landy Lancaster, Jerry Lum, Jack McSwain, James Messick, Daniel Moody,

Jack Obander, Patricis Orr, David Parris, Helen Payne, Virginia Perry, Winfred Plunkett, Debra Sanders, Thomas Sanders, Orin Shaw, Paul Stein, Zeefie Swanegan, Robert L. Swartz, George Thorpe, Lonnie Trammell, Stanley Walkup, Peggy Walton, Clinton Wilburn, Daniel Williams, Richard Williams, Barbara Yott, Debra Coy, David DeSelms, William Dunlap, Marilyn Gaitlyn, Jimmy Gatewood, Frances Hinds, Laveda Montague, Fred Stockton, Ronald Williams and Rosetta Williams.

II.

Defendant, Big Three Industries, Inc. is a Delaware Corporation with its principal place of business in Texas and has previously been served and is before this court for all

Defendant, Chemical Specialists & Development Inc. is a Texas Corporation and has previously been served and is before this court for all purposes.

Defendant, E. I. DuPont de Nemours Company, Inc. is a Delaware Corporation and has previously been served and is before this court for all purposes.

General Electric Company is a New York Corporation and has previously been served and is before this court for all purposes.

Defendant, GTE Products Corp. is a Massachusetts Corporation and has previously been served and is before this court for all purposes.

Defendant, Haynes International, Inc. is a Delaware Corporation and may be served with process by serving

its registered agent C. T. Corporation System, 350 N. St. Paul Street, Suite 2900, Dallas, TX, 75201.

Defendant, Jessop Steel Company is a Pennsylvania Corporation and has previously been served and is before this court for all purposes.

Defendant, J. W. Harris Co., Inc. is an Ohio Corporation and has previously been served and is before this court for all purposes.

Defendant, Metallurgical Technologies Inc. is a Texas Corporation and has previously been served and is before this court for all purposes.

Defendant, Pratt & Whitney Company Inc. is a foreign corporation doing business in the state of Texas and has previously been served and is before this court for all purposes.

Defendant, Thunderbird Sales Company is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes.

Defendant, Union Carbide Chemicals & Plastics Company, Inc. is a New York Corporation and has previously been served and is before this court for all purposes.

Defendant, United Technologies Corporation is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes.

Pursuant to agreement with all defense counsel this petition does not need to be reserved on the Defendants even with the addition of the Plaintiffs hereto.

III.

Venue is proper in Jefferson County, Texas pursuant to § 15.037 of the Texas Civil Practices & Remedies Code in that one or more Defendants are foreign corporations with an agent or representative in Jefferson County, Texas.

IV.

Plaintiffs are compelled to bring this action because of the personal injuries and damages of Plaintiffs herein for toxic chemical and metal exposure. Plaintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, cadmium and chromium, as well as various solvents and other products including acetylene, freon TF solvent, freon PCA, TRV 108, RTV 106, copper, iron, lanthanum, manganese, molybdenum, nickel, silicon, vanadium, tungsten, zirconium, yttrium, aluminum, titanium, boron, columbium, tantalum, silver, zinc, tin, PWA1317, PWA1306, PWA1307 D, carbon, trichloromethane, ADH powder, grizeldalloy-0001, AMS 4782, haynes 188, while working at Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiffs would show that said chemicals, solvents and metals were manufactured or provided by one or more of the named Defendants. Plaintiffs would further show that General Electric Company, Pratt & Whitney Company Inc., and United Technologies Corporation provided jet

engines to Tinker Air Force Base which were worked on and repaired by the above-referenced Plaintiffs. Each Plaintiff listed above was exposed to the dust, solvents and fumes of the jet engine and jet engine parts. These Plaintiffs worked on the jet engines by grinding, reworking, and being generally exposed to the metals produced by the jet engines and jet engine parts during the operation as well as the solvent and chemicals used in that work. The jet engines emitted a significant amount of cobalt, chromium and cadmium during the grinding, reworking and otherwise modification of the engines. Plaintiffs were also exposed to other hazardous chemicals and solvents while working at the air force base.

V.

Plaintiff would show that each of the above referenced Plaintiffs have been employed at Tinker Air Force Base and were exposed to significant amounts of chemicals, solvents and metals. Plaintiffs were exposed to the chemicals, solvents and metals without any warning of the true dangerous nature of said chemicals, solvents and metals and their potential for causing adverse health effects upon humans exposed to them. Plaintiffs would show that such chemicals, named above, were designed, formulated, manufactured and distributed by the above-named Defendants; and they violated the terms and provisions of Section 402a and 402b of the Restatement of Torts (2nd).

VI.

The Defendants also breached the expressed and implied warranties of fitness and merchantability with respect to said products in that the products were not fit for the purposes intended; and in other respects were such that the Defendants are liable under principles and concepts of strict product liability. The aforesaid conditions, defects and breaches of warranty were a proximate and/or producing cause of the injuries to all plaintiffs.

VII.

Plaintiffs would further show that said Defendants were negligent in the manner in which they designed, formulated, manufactured and marketed said chemicals, solvents and metals as well as the jet engines manufactured, designed and formulated by General Electric Company and Pratt & Whitney Company Inc., and United Technologies Corporation; and that they were further negligent and grossly neglect in the manner in which they failed to properly test said chemicals, metals and solvents and jet engines before placing them in the hands of Tinker Air Force Base employees; they were further negligent and grossly negligent failing to warn and instruct the individuals working at Tinker Air Force Base, Plaintiffs herein, of the proper way to handle said products and/or the proper way to protect one's body against said products and/or the toxicity of said products so as to prevent health effects caused by those products. Such negligence and gross negligence was a proximate/producing cause of the exposures in question and the injuries and damages of these Plaintiffs.

VIII.

By the negligent and grossly negligent actions as described in paragraph VII, these Defendants negligently inflicted mental distress on these Plaintiffs. Plaintiffs plead a cause of action for negligent infliction of mental distress as related to their exposure and injuries as caused by these Defendants' products.

IX.

Plaintiffs would further show that by reason of the exposure of the Plaintiffs to such products, they were caused to suffer and sustain irreparable brain damage, liver disease, tumors, upper respiratory disease and various other damages to their body and person.

X.

Plaintiffs would further plead a cause of action for fear of brain disorders, cancer, and other diseases as a result of the exposure to the above-referenced chemicals.

XI.

Plaintiffs further sue all Defendants for the physical pain and suffering that Plaintiffs have suffered as a result of the injuries they sustained. Additionally, Plaintiffs sue for recovery of damages herein for physical pain and suffering which they will endure for the remainder of their lives in an amount in excess of the minimum jurisdictional limits of this Court.

XII.

Plaintiffs further sue all Defendants for reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question. Additionally, Plaintiffs further sue for reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future and for reasonable expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

XIII.

Plaintiffs further sue all Defendants for loss of earnings which Plaintiffs have sustained up until the time of trial. Additionally, Plaintiffs further sue for the loss of reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future.

XIV.

Plaintiffs would show that they sustained mental anguish of an almost incalculable nature including the obvious mental anguish which necessarily accompanies any type of brain disorder, and fear of contracting brain disorders, cancer and other diseases as a result of their exposure to the above-referenced products. Plaintiffs also sue all Defendants for the mental anguish they will suffer for the remainder of their lives in an amount in excess of the minimum jurisdictional limits of this Court. Accordingly, Plaintiffs will request that the jury considers a sum of money which will reasonably compensate Plaintiffs for

their damages resulting from the occurrence in question as follow:

1) Physical pain which the Plaintiffs have suffered up until the time of trial;

2) Mental anguish which the Plaintiffs have suffered up until the time of trial;

3) Reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question;

4) Loss of earnings which Plaintiffs have sustained up until the time of trial;

5) Physical impairment which Plaintiffs have suffered up until the time of trial;

6) Disfigurement which Plaintiffs have suffered up until the time of trial.

XV.

The jury will be asked to consider the following elements of damages which Plaintiffs will sustain in the future from the time of trial as a result of the incident made the basis of this lawsuit, subject to Plaintiffs' proof by preponderance of the evidence:

1) Physical pain and suffering which Plaintiffs will, in reasonable probability, suffer in the future;

2) Mental anguish which Plaintiffs will, in reasonable probability, suffer in the future;

3) Reasonable expenses for necessary medical and hospital care which will, in reasonable

medical probability, be required by Plaintiffs in the future;

4) The loss reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future;

5) The damages which result from the physical impairment which Plaintiffs will continue to suffer in the future and the inability to perform those tasks and services which they ordinarily would perform in the future;

6) The disfigurement which Plaintiffs will continue to suffer in the future.

7) The reasonable expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

XVI.

Therefore, Plaintiffs will prove upon trial of this cause, they have sustained damages as a direct and proximate result of the negligence and gross negligence of Defendants herein and/or the violations of the applicable products liability laws were a producing and or proximate result of such damages and request that judgment be entered against all Defendants in the amount proven at the time of trial.

XVII.

Plaintiffs would show that Defendants were aware of the latent defects in their products. Therefore, this conscious decision to permit the products to be used by

workers at Tinker Air Force Base without adequate warnings or precautions constitutes a wanton, willful disregard for the rights of Plaintiffs which renders Defendants liable to Plaintiffs for exemplary damages. The amount of exemplary damages is in excess of the minimum jurisdictional limits of this Court.

XVIII.

Plaintiffs further claim prejudgment interest at the maximum rate allowed by law.

XIX.

Plaintiffs' damages sought herein exceed the minimum jurisdictional amounts necessary to place jurisdiction on this Honorable Court and all damages sought against all Defendants.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein as the law directs, and that upon final hearing, Plaintiffs have and recover judgment of and from the Defendant, both jointly and severally, in the sum in excess of the minimum jurisdictional amounts of this Court, in addition to costs of court, prejudgment and post-judgment interest which may be authorized by law, and the Plaintiffs have such other and further relief, both

general and special, at law and in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

WELLER & GREEN, L.L.P.
550 Fannin, Suite 500
Beaumont, Texas 77701
(409) 838-0101
(409) 838-6780 (Fax)

BY /s/ Mitchell A. Toups
MITCHELL A. TOUPS
State Bar No. 20151600
B. ADAM TERRELL
State Bar No. 19790900

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff respectfully requests a trial by jury.

BY /s/ Mitchell A. Toups

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was delivered to all counsel of record by regular and/or certified mail, return receipt requested, on this the 6th day of August, 1993.

/s/ Mitchell A. Toups
MITCHELL A. TOUPS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES E. AKIN, ET AL.,	§	
PLAINTIFFS,	§	
	§	
V.	§	CAUSE NO. ___
BIG THREE INDUSTRIES, INC.	§	
ET AL.,	§	
	§	
DEFENDANTS.	§	

NOTICE OF REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION:

PLEASE TAKE NOTICE that Defendant General Electric Company ("GE"), pursuant to 28 U.S.C. §§ 1441, 1442 and 1446 hereby file this Notice of Removal of this civil action to the United States District Court for the Eastern District of Texas from the District Court of Jefferson County, Texas. This Court has original subject matter jurisdiction under 28 U.S.C. § 1331 in that this action arose "under the Constitution, laws or treaties of the United States." Jurisdiction may also be founded on 28 U.S.C. § 1442(a)(1) as the state court action was commenced against GE as a person acting under authority of an officer of the United States. The basis for removal follows.

1.0 BACKGROUND

1.1 Plaintiffs served their Original Petition on GE on December 28, 1992. The suit was brought in the District Court of Jefferson County, Texas, 60th Judicial District, Cause No. B-144,313 against GE and eleven other defendants as follows: Big Three Industries, Inc., E.I. du Pont de Nemours Company, Inc., Union Carbide Chemicals & Plastics Company, Inc., Chemical Specialists & Development Inc., GTE Products Corp., Haynes International, Inc., Jessop Steel Company, J. W. Harris Co., Metallurgical Technologies, Inc., and Thunderbird Sales Company. The action is styled *James E. Akin, et al. v. Big Three Industries, Inc. et al.* United Technologies Corporation was subsequently added as a defendant. A true and correct copy of the Citation and Original Petition, the First Amended Petition, the Second Amended Petition, and the Third Amended Petition are attached hereto as Exhibits A, B, C and D respectively, and constitute all process, pleading, and orders served on GE in the action.

1.2 Defendants, including GE, received answers from the Plaintiffs to the Defendants' First Set of Interrogatories on July 16, 1993. The information provided in the interrogatories has enabled GE to ascertain that the action is removable, and thus this Notice is being timely filed within thirty (30) days after receiving the interrogatories, pursuant to 28 U.S.C. § 1446(b). Under § 1446(b), where a case is not originally removable, "the time for removal begins only after defendant receives a copy of a pleading, motion, or other paper which shows that the action has become removable. . . . Thus the defendant does not have to speculate as to facts forming the basis for removal." *Jong v. General Motors Corp.*, 359 F.Supp.

223, 226 (N.D. Calif. 1973). Further, answers to discovery requests such as interrogatories may be "other papers" under § 1446(b). *See Bonnell v. Seaboard Air Line Railroad Co.*, 202 F. Supp. 53, 54 (N.D. Fl. 1962) (holding that depositions and requests for admissions in the state court proceeding may be "other papers" for purposes of 28 U.S.C. § 1446(b)).

1.3 It would appear that the information disclosed by Plaintiffs' answers to interrogatories was also the first demonstration of removability as to any of the other twelve defendants. Within thirty days from service of the answers, GE has obtained the consent of these defendants pursuant to 28 U.S.C. § 1441(a). See Exhibit E, attached.

2.0 FEDERAL QUESTION JURISDICTION (§ 1331)

2.1 Plaintiffs' answers to interrogatories disclosed to the Defendants that all plaintiffs are civilian employees of the Department of the Air Force, and that *all* their duties were performed within the boundaries of Tinker Air Force Base ("AFB"), Oklahoma City, Oklahoma. Plaintiffs' have alleged injuries involving exposure to certain chemicals. The interrogatories also identify the specific chemicals involved.

2.2 Removal is proper under § 1441(a) on the basis of a substantial federal question within the meaning of 28 U.S.C. § 1331. Personal injury sanctions arising form incidents occurring on federal enclaves may support district court jurisdiction under § 1331 and therefore arise under the Constitution. *See Willis v. Craig*, 555 F.2d 724, 726 (9th Cir. 1977); *Mater v. Holey*, 200 F.2d 123, 125 (5th Cir. 1952).

2.3 Plaintiffs' answers to interrogatories indicate that exposures took place solely within the confines of Tinker AFB. Such an Air Force base is a federal enclave subject to federal statutory and common law, and federal regulations.

3.0 SUITS AGAINST PERSONS ACTING UNDER OFFICERS OF THE U.S.

3.1 An additional basis for removal is founded on 28 U.S.C. § 1442(a)(1) as the state court action involves GE as a person acting under the authority of the Secretary of the Air Force and his delegee, the contracting officer on the jet engine contracts. The Plaintiffs' answers to interrogatories disclose the required nexus between the claimed injuries and the establishment of the maintenance procedures for military jet engines on the base at Tinker AFB. The design, production, and maintenance of jet engines was pursuant to contracts, each of which was executed by an officer of the United States.

3.2 The Air Force included detailed design, production and maintenance specifications as part of the contracts. GE was at all times acting under the authority of an officer of the United States in designing, manufacturing and establishing maintenance procedures for all of the jet engines identified in interrogatories as the ones to which the plaintiffs claim exposure. As established by Plaintiffs' answers to interrogatories, maintenance on the engines for which plaintiffs' claim injury took place entirely at Tinker AFB, a U.S. Military installation at which the repair of jet engines is accomplished by persons such as plaintiffs pursuant to contracts executed and

orders given by officers of the United States Air Force. Further, GE intends to raise the government contractor defense established in the case of *Boyle v. United States Technologies Corp.*, 487 U.S. 500 (1988). GE has therefore met the requirements for removal based on a suit against a person acting under authority of a federal officer.

WHEREFORE, Defendant General Electric Company, pursuant to these statutes and in conformance with the requirements of 28 U.S.C. § 1446, removes this action for trial to this Court on this 12th day of August 1993.

Respectfully submitted,

By /s/ Samuel E. Stubbs
Samuel E. Stubbs
State Bar No. 19434500

1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

ATTORNEY-IN-CHARGE FOR
GENERAL ELECTRIC COMPANY

CERTIFICATE OF SERVICE

This Notice of Removal was served on the following counsel of record in compliance with Rule 5 of the Federal Rules of Civil Procedure on August 12, 1993.

Hubert Oxford
Benckenstein, Oxford
& Johnson
P.O. Drawer 150
Beaumont, Texas 77704

Kent M. Adams
Adams, Coffey & Duesler
P.O. Box 7505
Beaumont, Texas 77726

Gerald L. Bracht
David P. Griffith
Mayor, Day, Caldwell
& Keeton
700 Louisiana, Suite 1900
Houston, Texas 77002

Martin L. Mayo
Giessel, Stone, Barber
& Lyman
909 Fannin, Suite 2700
Houston, Texas 77010

Bill Maynard
Bierne, Maynard &
Parsons
1300 Post Oak Blvd.
Suite 2400
Houston, Texas 77056

Arthur R. Almquist
Mehaffy & Webber
500 Dallas, Suite 1200
Houston, Texas 77002

Gerald Flatten
Reinstra, Dowell &
Splatten
470 Orleans, Suite 1010
Beaumont, Texas 77701

M. C. Carrington
Mehaffy & Webber
2615 Calder
Beaumont, Texas 77704

Richard L. Josephson
Baker & Botts
910 Louisiana, 38th Floor
Houston, Texas 77002

Donald F. Maierson
Kahn & Maierson
1914 N. Memorial Way
Houston, Texas 77007

Mitchell A. Toups
Weller, Wheelus & Green
550 Fannin, Suite 500
Beaumont, Texas 77701

James B. Huddleston
Metallurgical Technologies
14436 Max Road
Pearland, TX 77581

/s/ Samuel E. Stubbs
Samuel E. Stubbs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES E. AKIN, ET AL.	§	
	§	
VS.	§	C.A. NO.
BIG THREE INDUSTRIES,	§	1:93CV82
INC., ET AL.	§	
	§	

PLAINTIFFS' MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs herein, and file this their Motion to Remand, pursuant to 28 U.S.C. § 1447(c) and in support thereof would respectfully show unto the Court the following:

I.

Plaintiffs filed suit in the 60th Judicial District Court of Jefferson County, Texas on or about November 13, 1992 alleging various acts, omission and wrongdoing of all Defendants. Plaintiffs asserted claims in Texas state court and based their right to recover damages against the Defendants under Texas state law. The Plaintiffs did not assert any cause of action under any federal statute or federal common law. On or about August 12, 1993, Defendants filed a Notice of Removal of the Plaintiffs' state court action over ten (10) months after the original filing of the lawsuit in state court.

II.

Federal jurisdiction is determined from the contents of "Plaintiffs' Complaint as it stands at the time the Petition for Removal is filed and the case seeks entry into the federal system." 14A, Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, Sec. 3722. See also, *Pullman Co. v. Jenkins,* 305 U.S. 534, 83 L.Ed. 334, 59 S.Ct. 347, 349 (1939); *Great Northern Ry. Co. v. Alexander,* 245 U.S. 276, 38 S.Ct. 237 (1918); *Henry Carter,* 618 F.2d 1093, 1101 (5th Cir. 1980) cert. denied 101 S.Ct. 1410; *Brown v. Southwestern Bell,* 901 F.2d 1250, 1254 (5th Cir. 1990). The burden is upon the removing defendant to establish that such removal is proper. *Laughlin v. Prudential Ins. Co.,* 882 F.2d 187, 190 (5th Cir. 1989). All doubts against removal must be resolved in favor of the party seeking remand and against the party who removed the case. *Butler v. Polk,* 592 F.2d 1293, 1296 (5th Cir. 1979).

The Supreme Court has established a principal to restrict and limit the removal jurisdiction of the federal courts. *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 61 S.Ct. 868, 872 (1941). In *Shamrock,* Justice Stone stated for the court:

> Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide the determination of controversies in their courts, may be

> restricted only by action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of the state government, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the price limits which the state has defined."

Sheets, 313 U.S. 108-109. See also, *Finn v. American Fire and Casualty Company*, 207 F.2d 113, 116 (5th Cir. 1953), cert. denied 74 S.Ct. 476, *Zbranek v. Hofheinz*, 727 F.Supp. 324, 326 (D.C.Tex.1989).

III.

Defendants agree that total diversity between the parties does not exist in this case and argue that federal question is the basis for removal. (Defendants' Notice of Removal p. 3). In fact, the presence of several in-state Defendants in this case absolutely precludes removal on the basis of diversity of citizenship. 28 U.S.C.A. 1441(b). Therefore, Defendants' misguided attempt to remove this case from the state court in which it was properly filed is based solely upon allegations of the existence of a "federal question." (Defendants' Notice of Removal p. 3).

IV.

Defendants' allegations of the existence of a "federal question" sufficient to justify this removal are confusing and inconsistent at best. In fact, it appears as though Defendants are uncertain about the merits of this removal which is exemplified by the following statement in their Notice of Removal:

> Personal injury actions from incidents occurring on federal enclaves *may* support district court jurisdiction under Section 1331 and therefore arise under the Constitution.

Defendants' Notice of Removal p. 3. Defendants further state the case is removable because of the possibility of a government contractor defense or federal officer jurisdiction. Without a doubt, no federal question jurisdiction exists and this cause was improperly removed to this Court.

V.

Defendants' Removal is untimely pursuant to 28 U.S.C. § 1446(b). 28 U.S.C. § 1446(b) states the following:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.

Assuming only for the purposes of this paragraph that Defendants' misguided allegations in their Removal are correct, then Defendants have a fatal jurisdictional error in their removal proceedings. One basis for Defendants' Notice of Removal is federal officer jurisdiction which gives rise to a government contract immunity defense. Defendants contend that their first knowledge that a government contractor defense was available was subsequent to Plaintiffs' Answers to Interrogatories. (See Defendants' Notice of Removal p. 2). Defendants state that:

> The information provided in the interrogatories has enabled G.E. to ascertain that the action is

> removable, and thus this Notice is being timely filed within thirty (30) days after receiving the interrogatories, pursuant to 28 U.S.C. § 1446(b).

This statement is absolutely incorrect in light of the Motion for Summary Judgment filed by Chemical Specialists & Development, Inc. on June 16, 1993 based on government contractor immunity. (See Defendant, Chemical Specialists & Development, Inc.'s Motion and Brief for Summary Judgment attached here to as Exhibit "A"). Apparently, one Defendant was able to ascertain the government contractor defense was available from the Plaintiffs' Petition. Defendants' Notice of Removal was not even filed within 30 days of the date that another Defendant filed a Motion for Summary Judgment based on government contractor immunity.

Defendants further state that:

> Plaintiffs' Answers to Interrogatories indicate that exposure took place solely within the confines of Tinker Air Force Base. Such an air force base is a federal enclave subject to federal statutory and common law, and federal regulations.

(See Defendants' Notice of Removal p. 3). Defendants contend that Plaintiffs' Responses to Interrogatories was their first knowledge that Plaintiffs were exposed to chemicals at Tinker Air Force Base when in reality, the Plaintiffs' Original Petition stated the following:

> Plaintiffs would show that all Plaintiffs were exposed to hazardous chemicals, including, but not limited to cobalt, chromium, cadmium, acetylene, ethanol and heptane while working

> for the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma.

(Plaintiffs' Original Petition p. 6).

Even if we were to assume that there is a federal question, these Defendants have violated the provisions of 28 U.S.C. §1446(b) in that they did not remove the case within thirty days upon receipt of the Plaintiffs' pleadings expressing the case is removable. The courts have strictly construed this thirty day requirement, and if that requirement is not met, removal is improper. *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990).

VI.

Plaintiffs strongly contend that Defendants' Removal of this lawsuit was untimely, but in the unlikely event this Court determines the Removal was timely, Defendants have no basis for federal jurisdiction. Defendants cite only two cases that they contend *"may"* support federal jurisdiction pursuant to Section 1331.

The United States Supreme Court in *Ohio River Contract Company v. Honorable Thomas R. Gordon*, 244 U.S. 68, 37 S.Ct. 599, 61 L.Ed. 997 (1917), dealt with the identical issue this Court faces. The plaintiff filed a lawsuit in state court. Defendants alleged that jurisdiction was inappropriate in state court and that federal jurisdiction was proper. The plaintiff was injured while working on a United States government contract at a canal reservation owned by the United States. The issue before the court was:

> Under these facts it was insisted the court was without jurisdiction (a) because when the accident occurred the company and the plaintiff were engaged in work under a contract with the United States government; (b) because the cause of action arose on land acquired by the United States by purchase or condemnation with the consent of the legislature of Kentucky, and therefore, under article 1, §8, clause 17, of the Constitution of the United States, the jurisdiction of the Federal government was exclusive.

Id. at 600. The court held:

> We at once put out of view the contention that the [state] trial court was without jurisdiction because the parties, at the time of the accident, were engaged in work under a contract with the United States government, since the want of merit in the proposition has been previously established. *Gromer v. Standard Dredging Co.*, 224 U.S. 362, 371, 56 L.Ed. 801, 32 Sup. Ct. Rep. 499.
>
> . . .
>
> an action for personal injuries being in its nature transitory and susceptible of being brought in any jurisdiction in which the defendant may be impleaded, there is no foundation for the contention that the court had no jurisdiction over the subject matter of the suit.

Id. at 601. Texas courts have also followed the United States Supreme Court mandate that state courts have jurisdiction over cases arising out of incidents on federal enclaves. *Red Top Cab Co. v. Capps*, 270 S.W.2d 273 (Tex.Civ.App. – Austin 1954, writ ref'd n.r.e.); *Day & Zimmermann, Inc. v. Hatridge*, 831 S.W.2d 65 (Tex.Civ.App.

– Texarkana 1992, no writ). In *Capps*, an automobile accident occurred on a military base. Defendants questioned the jurisdiction of the state court because the collision occurred within Fort Hood, an area which the United States government had exclusive jurisdiction. The court held that since the action is transitory, state court jurisdiction is proper. Additionally, in *Hatridge*, the court dealt with the similar issue of whether or not state courts had jurisdiction over actions arising on federal enclaves. The court held:

> State courts can have jurisdiction over an action arising on federal enclave if the cause of action is transitory. *Red Top Cab Co. v. Capps*, 270 S.W.2d 273 (Tex.Civ.App. – Austin 1954, writ ref'd n.r.e.) Such actions can be maintained wherever there is in personam jurisdiction over the parties.

Hatridge, 831 S.W.2d at 68. It is apparent that we must determine whether or not a personal injury action is transitory. *Capps* clearly held that a personal injury lawsuit is transitory and a more recent decision, *Lutheran Broth. v. Kidder Peabody & Co., Inc.*, 829 S.W.2d 300 (Tex.App. – Texarkana 1992, writ granted without reference to merits) reiterated that same point. The court stated, "[t]ort actions are transitory in nature and can be instituted and tried in any court which has jurisdiction in personam of the defendant." *Kidder*, 829 S.W.2d at 307. Since a transitory action which occurs on a federal enclave shall be maintained in state court, Defendants' Removal based on federal enclave jurisdiction is without merit.

VII.

Defendants further contend that removal is proper based on the government contractor defense. (Defendants' Notice of Removal p. 4). As previously expressed, a plaintiff is "master of his claim" and whether or not removal is proper is based on the plaintiff's assertions in their pleadings. Unquestionably, "a defense that raises a federal question does not confer federal question jurisdiction." *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (1992). The Fifth Circuit has held:

> The well pleaded complaint rule places even further restrictions on a defendant's ability to remove a case from state court. The rule provides that the plaintiff's properly pleaded complaint governs the jurisdictional determination, and if, on its face, such a complaint contains no issue of federal law, then there is no federal questions jurisdiction. [Citation omitted]. The fact that a federal defense may be raised to the plaintiff's action even if both sides concede that the only real question at issue is created by a federal defense – will not suffice to create federal question jurisdiction. [Citations omitted]. Thus, the general rule provides that a federal defense to a state law claim does not create removal jurisdiction.

Aaron v. National Union Fire Insurance Company of Pittsburgh, 876 F.2d 1157, 1160-61 (5th Cir. 1989). Undoubtedly, Defendants recognize the fact that the government contractor defense does not create federal jurisdiction. "The preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly

manifested in an intent to make causes of action . . . removable to federal court'." *Aaron*, 876 F.2d at 1163. Where there is no clear manifestation of intent to create federal jurisdiction, the prudent approach is to remand the case to state court. *Id.*

VIII.

Defendants further contend that removal was proper pursuant to 28 U.S.C. § 1442(a)(1) and that the Defendants were acting under government officers as required by that section. Defendants fail to meet the initial element of the section because Defendants are not acting under a federal officer but were acting under a federal agency. One Defendant's Motion for Summary Judgment clearly states, "Chemical Specialists and Development, Inc., did enter contracts with the government through the Defense General Supply Center in Memphis, Tennessee, and the General Services Administration Warehouse in Fort Worth, Texas." (see Chemical Specialists & Development, Inc.'s Motion for Summary Judgment, P. 2, attached as Exhibit "A"). These facts are further confirmed in an affidavit from Steve Cook which is also attached to Chemical Specialists & Development, Inc.'s Motion. Defendants' contracts are with federal agencies and not with federal officers. Removal under Section 1442(a)(1) is improper. The Supreme Court recently held that federal agencies are not entitled to assert federal officer removal; only a federal officer is. *International Primate Protection League v. Administrators of the Tulane Educ. Fund*, 498 U.S. 980, ___ 111 S.Ct. 1700, 1703, 114 L.Ed.2nd 134 (1991). Therefore, a contractor acting under the United States Department of the Air Force, an agency of the United

States, is not entitled to rely on Section 1442(a)(1) as a basis for removal jurisdiction. *Bahrs v. Hughes Aircraft Co.*, 795 F.Supp. 965 (D. Ariz., 1992).

Additionally, in order for a Defendant to be able to remove pursuant to 28 U.S.C. § 1442(a)(1), they must be an individual and not a corporation. *Krangle v. Crown*, 791 F.Supp. 1436 (S.D.Cal. 1992). There is conflicting authority on whether or not a corporation may fall within 28 U.S.C. § 1442(a)(1). It is Plaintiffs' contention that the proper manner is to follow *Krangle* and determine that a corporation does not fall within the applicable statute.

The most thorough and correct analysis on persons acting under a federal officer is displayed in a agent orange case entitled, *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992). This case involves the question of whether or not a company could properly remove the lawsuit based on 28 U.S.C. § 1442(a)(1). Plaintiffs filed a lawsuit in Texas state court alleging various state law causes of action. Plaintiffs were civilians in Vietnam during the war and were contaminated by agent orange. Plaintiffs sued various companies that were involved in the manufacture and distribution of agent orange. Defendants removed the case to federal court based upon 28 U.S.C. § 1442(a)(1) on the grounds that they were acting under government orders when they supplied the alleged defective agent orange.

The first requirement of Section 1442(a)(1) requires that the defendants make a colorable claim to a federal defense. *Id.* at 943. The only defense listed in Defendants' Notice of Removal is the government contractor defense. Additionally, the government contractor defense only

allows a defendant who manufactures products at the directions of the federal government to escape tort liability for harms caused by those products. *Boyle v. United States Technologies Corp.*, 487 U.S. 500 (1988), 108 S.Ct. 2510, 101 L.Ed.2nd 442, (1988). In this instance, no Defendant manufactured products at the direction of the federal government, but manufactured products that were subsequently purchased by the federal government; thus, making the government contractor defense inapplicable. In order for Defendants to have a colorable claim to a federal defense, they must prove that they manufactured the jet engines or chemicals at the direction of the federal government. *Boyle*, 497 U.S. at 514. This means that no G.E. jet engine was sold to anyone but the federal government and that all jet engines were manufactured wholly for the federal government. Obviously, this did not occur. Additionally, as to the chemical Defendants in this lawsuit, they must prove that the chemical was made exclusively for the government in order for the government contractor defense to apply. In this instance, the Defendants only federal defense is government contractor indemnity and in *Ryan*, the court stated:

> [T]he military contractor defense – which provides that a contractor must inform the government of any dangerous consequences of using its product of which the government does not know – established not a defense but a federal common law standard of care that must be met to avoid liability. If defendants were relying solely on the federal common law military contractor "defense," there would be a question as

> to the existence of a colorable claim to a federal defense required by *Mesa*.

Ryan 781 F.Supp. at 945.

The second element of Defendants' Removal is that there must be a person acting under an officer. We have previously expressed that they are not acting under an officer but acting under an agency and the second element of Defendants' Removal is not met. In order for a company to be a person acting under an officer, Defendants must show that all acts were performed pursuant to an officer's direct order or to comprehensive and detailed regulations. *C.F. Bakalkus v. Crossland Savings Bank,* 781 F.Supp. 140, 144-145 (E.D.N.Y. 1991). The real question is whether the Defendants are being sued because of actions required by the government. *Ryan,* 781 F.Supp. at 945. If Defendants simply produced a product and ultimately sold it to the government, then the "federal nexus" between the actions for which they are being sued and the directives of federal officers is not met. *Id.* at 945. *Ryan* ultimately held that the defendants had not met their burden of establishing that they were acting under federal officers sufficient to maintain jurisdiction of the case pursuant to 28 U.S.C. § 1442(a)(1). The case was properly remanded to Texas state court. *Id.* at 953.

IX.

Defendants removal is fundamentally defective because defendants failed to comply with 28 U.S.C. §1446(b). Without question, defendants had actual knowledge sufficient to ascertain the viability of removal at the time of service of Plaintiffs' Original Petition in State

Court on November 13, 1992. Defendants Notice of Removal was not filed until August 12, 1993. Defendants failed to file the removal within 30 days of Plaintiffs' Petition; therefore, Remand is proper.

Additionally, federal enclave jurisdiction is an insufficient ground to sustain a Notice of Removal and Defendants evidence is insufficient to give rise to jurisdiction pursuant to 28 U.S.C. §1442(a)(1). This cause of action must be remanded to the 60th Judicial District Court of Jefferson County, Texas pursuant to 28 U.S.C. §1447(c).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs' requests this matter be set for hearing, and that on final hearing of this Motion, the Court grant Plaintiffs' Motion to Remand pursuant to 28 U.S.C. §1447(c) and for such other and further relief, as it may show itself justly entitled to receive.

Respectfully submitted,

WELLER & GREEN, L.L.P.
P. O. BOX 350
BEAUMONT, TX 77704-0350
(409) 838-0101
(409) 832-8577 (FAX)

BY /s/ Mitchell A. Toups
MITCHELL A. TOUPS
STATE BAR NO. 20151600
B. ADAM TERRELL
STATE BAR NO. 19790900

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to Plaintiff's counsel of record, by Certified Mail, Return Receipt Requested and/or by Hand-Delivery, and to all known counsel of record by regular mail, on this the 1st day of September, 1993.

/s/ Mitchell A. Toups
MITCHELL A. TOUPS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40589

IN RE: JAMES E. AKIN, ET AL.,

Petitioners.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

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(Filed Jul. 28, 1994)

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES E. AKIN, RICHARD G.	§	
ARELLANO, CHARLES L.	§	
BALDWIN, ANNIE M. BARNES,	§	
GARY BLEDSOE, MARCIA	§	
BRANNOCK, DELTON BROWN,	§	
GARY BURWELL, TIMOTHY	§	
CARAWAY, THOMAS W.	§	
CLARK, DAVID CLAUSEN,	§	
RICHARD COTEY, CONNIE	§	
COTTRELL, RONNIE D.	§	
COTTRELL, STEVEN L. COY,	§	Case No.
HUGH CROW, NATHAN	§	CIV-94-832-C
D'AMICO, EDDIE R. DANNA,	§	
JR., DONNA M. DAVIS,	§	
LEANDRA DEMOSS, ORVILLE	§	
DESHIELDS, LOUIS R.	§	
DICKINSON, OLLIE	§	
DILLISHAW, JR., DANNY	§	
DRISKILL, EDDIE DUCK, JR.,	§	
DANNY DUNN, JENNY L.	§	
DUREN, BILL R. DURINGTON,	§	
DORIS BROWN DURLIN,	§	
STEPHEN RAY DUTY, LEON	§	
EALON, LARRY ELLIOTT,	§	
DEBRA M. EMERICH, JANETTE	§	
K. FARLEY, LLOYD FREED, JON	§	
G. GABBARD, DEBRA HALL	§	
GABBARD, LINDA D.	§	
GATEWOOD, LANCE GILLEY,	§	
MAX R. GLOVER, WENDELL	§	
GLOVER, JAMES GOFF,	§	
WENDELL GOMEZ, JOHN C.	§	
GOULD, PHYLLIS J. GOULD,	§	
REGINA G. GRISSAM,	§	

KENNETH O. HART, MICHAEL §
HAWKINS, EDGAR HOUSTON, §
GERALD HOUSTON, §
VALENCIA HOWELL, RALPH V. §
ICE, RAY IRVAN, ERIC L. §
JANOUSEK, DAVID KEISER, §
BILLY B. KING, LARRY D. §
LIDELL, DAVID LOVE, ROBERT §
C. LOVE, JIMMY LYNCH, §
THOMAS MARSHALL, JAMES §
MCLANE, MICHAEL D. §
MOWLES, JEFFREY MURRAY, §
MELVIN E. NORTON, §
ZENEPHOR OVERSTREET, §
JAMES M. OWEN, TERRY W. §
OXLEY, RONALD K. PEOPLES, §
MICHAEL PHILLIPS, LOUISE §
PICKARD, MARIE L. PLUMLEE, §
PHILLIP PLUMLEE, RICK §
REAMES, SARAH REESE, JACK §
D. RHODEN, OTHA L. §
RHODEN, WAYNE §
RICHARDSON, DOROTHY §
RIMBOLD, TIJUANA §
ROBINSON, ALINE ROCKWELL, §
CHARLON S. ROGERS, §
SANDRA ROLLAND, MARLYS §
RONE, TONY E. RUBLE, MARY §
SAYRE, REATHA R. SCHLEGEL, §
GLORIA SHELTON AS §
REPRESENTATIVE OF THE §
ESTATE OF WILTON F. §
SHELTON, DECEASED, §
CHARLIE SHEPPARD, HERMAN §
D. SIKES, TERRY SIMPSON, §
WILLIAM D. SLATTERY, LARRY §

SMITH, KENNETH SNYDER, §
JESS STANLEY, CLAYTON D. §
STASTNY, MELISSA C. §
STASTNY, GAYLE S. STATON, §
PAUL STEIN, MARTHA J. §
STOROZYSZYN, RICK L. §
STUART, JAMES SYKES, §
EMMETT THOMAS, JR., §
BENJAMIN TINGLE, MARILYN §
J. TRACEY, GARY VESSELL, §
HELEN WALKER, WILLIAM §
WARD, NOREEN WELCH, §
GEORGE WEST, RANDY F. §
WIENS, LEONARD WILLIAMS, §
MORTEN D. WILLIAMS, LINDA §
WILLIS, GLENDA WRIGHT, §
HERMAN DALE WRIGHT, §
KENNETH L. WRIGHT, ALBERT §
A. WYATT, JAMES D. WYATT, §
JOHNNIE R. YORK, §

LOIS AYERS, TERRY BRUNER, §
FLOYD BURELSON, CHRISTY §
CANNON, MARK CHISHOLM, §
BILLIE COCHRAN, DELORES §
COLEY, VIRGIL W. CLARK, §
JAMES CROOM, MARY §
DODSON, SAUNDRA §
DUNCAN, JIMMY EASTON, §
DONALD FLATT, JAMES §
HENDERSON, DAVID HIGGINS, §
CATHY KALER, DEBRA §
KELLOGG, RUSSELL KINNEY, §
PHYLLIS KNOTT, LANDY §
LANCASTER, JERRY LUM, §
JACK MCSWAIN, JAMES §
MESSICK, DANIEL MOODY, §

JACK OBLANDER, PATRICIA ORR, DAVID PARRIS, HELEN PAYNE, VIRGINIA PERRY, WINFRED PLUNKETT, DEBRA SANDERS, THOMAS SANDERS, ORIN SHAW, ZEEFFIE SWANEGAN, GEORGE THORPE, LONNIE TRAMMEL, PEGGY WALTON, CLINTON WILBURN, DANIEL WILLIAMS, RICHARD WILLIAMS, AND BARBARA YOTT	§
DEBRA COY, DAVID DESELMS, WILLIAM DUNLAP, MARILYN GAITLYN, JIMMY GATEWOOD, FRANCES HINDS, LAVEDA MONTAGUE, FRED STOCKTON, RONALD WILLIAMS, AND ROSETTA WILLIAMS	§
Plaintiffs	§
VS.	§
CHEMICAL SPECIALISTS & DEVELOPMENT INC., E. I.-DUPONT de NEMOURS & COMPANY, INC., GENERAL ELECTRIC COMPANY, GTE PRODUCTS CORP., HAYNES INTERNATIONAL, INC., JESSOP STEEL COMPANY, J. W. HARRIS CO., INC., METALLURGICAL TECHNOLOGIES INC., PRATT & WHITNEY COMPANY, INC., THUNDERBIRD SALES COMPANY, UNION CARBIDE	§

CHEMICALS & PLASTICS §
COMPANY, INC., UNITED §
TECHNOLOGIES §
CORPORATION, ASHLAND §
CHEMICAL, ASHLANDOIL, §
KERR-MCGEE CHEMICAL CO., §
SHELL OIL COMPANY, SPRAY- §
ON SYSTEMS, INC., SHERWIN- §
WILLIAMS, MAGNAFLUX §
CORPORATION, MCGEAN- §
ROHCO, INC., formerly known §
as MCGEAN CHEMICAL §
COMPANY, INC., CEE BEE §
CHEMICAL, A DIVISION OF §
MCGEAN-ROHCO, INC., CEE §
BEE CHEMICALS, INC., MET- §
L-CHEK COMPANY, OCTAGON §
PROCESS, INC., PLAZE, INC., §
ROYAL LUBRICANTS §
COMPANY, INC., SOLVENTS & §
CHEMICALS, INC., STECO, §
INC., TAPMATIC §
CORPORATION, THOMPSON & §
FORMBY, INC., L&F §
PRODUCTS, INC., MINWAX §
COMPANY, INC., TRUFLEX §
RUBBER PRODUCTS COMPANY, §
BREAK-FREE, INC., DETROIT §
DIESEL-ALLISON CANADA §
EAST, INC., LOCTITE §
CORPORATION, SOUTHWEST §
PETRO-CHEM, INC., W.M. §
BARR & CO., INC., THE DOW §
CHEMICAL COMPANY, DOW §
INDUSTRIAL SERVICE OF THE §
DOW CHEMICAL COMPANY, §
DOW DIVISION OF THE DOW §

CHEMICAL COMPANY, §
BRAZOS OIL & GAS OF THE §
DOW CHEMICAL COMPANY, §
3M COMPANY, MINNESOTA §
MINING AND §
MANUFACTURING COMPANY, §
VULCAN MATERIALS §
COMPANY, MONSANTO §
COMPANY, MALLINCKRODT §
GROUP, INC., DIAMOND §
SHAMROCK CORP., DIAMOND §
SHAMROCK A/K/A §
OCCIDENTAL ELECTRO- §
CHEMICALS, INC., EL §
DORADO CHEMICAL CO., §
AMCO CHEMICAL CORP., §
SOLVENT CHEMICAL §
COMPANY, FISHER CHEMICAL, §
ALLIED CORPORATION, §
ALLIED-SINGAL, INC., §
ASBESCO, INC., NORTON §
COMPANY, EXXON §
CORPORATION, EXXON §
CHEMICAL, CSD, INC., CHEM- §
TRONICS, FEDERAL-MOGUL §
CORPORATION, MOBIL OIL §
CORPORATION, AMERON, §
INC., SAFETY-KLEEN §
CORPORATION, CSB, INC., §
DEVOE AND REYNOLDS §
COMPANY, INC., BLAZER §
EAST, INC., formerly known as §
KOPPERS COMPANY, INC., §
SARAN PROTECTIVE §
COATINGS CO., SEYMOUR OF §
SYCAMORE, INC., AMJAY §
CORPORATION, DEXTER §

CORP., UNI-KEM INTERNATIONAL, INC, MILLER-STEPHENSON CHEMICAL COMPANY, INC., formerly known as MILLER-STEPHENSON COMPANY OF CONN., INC., BEL-RAY COMPANY, INC., PACIFIC GRINDING WHEEL, INC., SPEEDCUT, INC., LHB INDUSTRIES, CRAWFORD LABORATORIES, INC., SHERWIN, INCORPORATED, CABOT CORPORATION, CABOT OIL & GAS MARKETING CORPORATION, CABOT OIL & GAS CORPORATION, BRENT AMERICA, INC., formerly known as BRENT CHEMICALS CORPORATION, CHEMICAL COMMODITIES AGENCY, PACKAGING SERVICE CO, INC., PENETONE CORPORATION, formerly known as W.C.P. INDUSTRIES, INC., CONTINENTAL CHEMICAL CO., INC., BORDEN, INC., formerly known as THE BORDEN COMPANY, ITW FLUID PRODUCTS GROUP, a Division of ILLINOIS TOOL WORKS, INC., ILLINOIS TOOL WORKS, INC., PRATT & LAMBERT UNITED, INC., formerly PRATT & LAMBERT, INC., BEECHAM HIP, INC., formerly BEECHAM HOME §§§§

IMPROVEMENT PRODUCTS,	§
formerly BEECHAM HOME	§
IMPROVEMENT PRODUCTS,	§
INC., formerly REMWELL, INC.,	§
POLYMERIC SYSTEMS, INC.,	§
DESOTO, INC., and VULCAN	§
CHEMICAL COMPANY, INC.,	§
PHIPPS PRODUCTS, a Division	§
of DOW CHEMICAL COMPANY,	§
	§
Defendants	§

PLAINTIFFS' FOURTH AMENDED ORIGINAL COMPLAINT

(Filed Oct. 3, 1994)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs, and files this their Fourth Amended Original Complaint complaining of the actions of Defendants, and for cause of action would respectfully show unto the Court as follows:

I.

Plaintiffs are residents of the State of Oklahoma and are as follows:

James Akin, Richard Arellano, Charles Baldwin, Annie M. Barnes, Gary Bledsoe, Marcia Brannock, Delton Brown, Gary Burwell, Timothy Caraway, Thomas W. Clark, David Clausen, Richard Cotey, Connie Cottrell, Ronnie Cottrell, Steven L. Coy, Hugh Crow, Nathan D'Amico, Eddie R. Danna, Jr., Donna M. Davis, Leandra DeMoss, Orville DeShields, Louis R. Dickinson, Ollie Dillishaw, Jr., Danny Driskill, Eddie Duck, Jr., Danny Dunn, Jenny L. Duren, Bill R. Durington, Doris Brown Durlin,

Stephen Ray Duty, Leon Ealon, Larry Elliott, Debra Emerich, Janette Farley, Lloyd Freed, Jon G. Gabbard, Debra Hall Gabbard, Linda D. Gatewood, Lance Gilley, Max R. Glover, Wendell Glover, James Goff, Wendell Gomez, John C. Gould, Phyllis J. Gould, Regina Grissam, Kenneth O. Hart, Michael Hawkins, Edgar Houston, Gerald Houston, Valencia Howell, Ralph V. Ice, Ray Irvan, Eric L. Janousek, David Keiser, Billy B. King, Larry D. Liddell, David Love, Robert C. Love, Jimmy Lynch, Thomas Marshall, James McLane, Michael D. Mowles, Jeffrey Murray, Melvin E. Norton, Zenephor Overstreet, James M. Owen, Terry W. Oxley, Ronald K. Peoples, Michael Phillips, Louise Pickard, Marie L. Plumlee, Phillip Plumlee, Rick Reames, Saran Reese, Jack D. Rhoden, Otha Phoden, Wayne Richardson, Dorothy Rimbold, Tijuana Robinson, Aline Rockwell, Charlon S. Rogers, Sandra Rolland, Marlys Rone, Tony E. Ruble, Mary Sayre, Reatha R. Schlegel, Gloria Shelton as Representative of the Estate of Wilton F. Shelton, Deceased, Charlie Sheppard, Herman D. Sikes, Terry Simpson, William D. Slattery, Larry Smith, Kenneth Snyder, Jess Stanley, Clayton D. Stastny, Melissa C. Stastny, Gayla S. Staton, Paul Stein, Martha J. Storozyszyn, Rick L. Stuart, James Sykes, Emmett Thomas, Jr., Benjamin Tingle, Marilyn J. Tracey, Gary Vessell, Helen Walker, William Ward, Noreen Welch, George West, Randy F. Wiens, Leonard Williams, Morten D. Williams, Linda Willis, Glenda Wright, Herman Dale Wright, Kenneth L. Wright, Albert A. Wyatt, James D. Wyatt, Johnnie R. York, Lois Ayers; Terry Bruner, Floyd Burelson, Christy Cannon, Mark Chisholm, Billie Cochran, Delores Coley, Virgil W. Clark, James Croom, Mary Dodson, Saundra Duncan, Jimmy Easton, Donald

Flatt, Randell Green, James Henderson, David Higgins, Cathy Kaler, Debra Kellogg, Russell Kinney, Phyllis Knott, Landy Lancaster, Jerry Lum, Jack McSwain, James Messick, Daniel Moody, Jack Obander, Patricis Orr, David Parris, Helen Payne, Virginia Perry, Winfred Plunkett, Debra Sanders, Thomas Sanders, Orin Shaw, Zeefie Swanegan, Robert L. Swartz, George Thorpe, Lonnie Trammell, Stanley Walkup, Peggy Walton, Clinton Wilburn, Daniel Williams, Richard Williams, Barbara Yott, Debra Coy, David DeSelms, William Dunlap, Marilyn Gaitlyn, Jimmy Gatewood, Frances Hinds, Laveda Montague, Fred Strickton, Ronald Williams and Rosetta Williams.

The Court has determined that there is jurisdiction from this cause of action. However, Plaintiffs disagree and contest jurisdiction of this Court and again request that the case be remanded to the 60th Judicial District Court, Beaumont, Jefferson County, Texas.

II.

Defendant, Chemical Specialists & Development Inc. is a Texas Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, E. I. DuPont de Nemours Company, Inc. is a Delaware Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, General Electric Company is a New York Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, GTE Products Corp. is a Massachusetts Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Haynes International, Inc. is a Delaware Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Jessop Steel Company is a Pennsylvania Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, J. W. Harris Co., Inc. is an Ohio Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Metallurgical Technologies Inc. is a Texas Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Pratt & Whitney Company Inc. is a foreign corporation doing business in the state of Texas and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Thunderbird Sales Company is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Union Carbide Chemicals & Plastics Company, Inc. is a New York Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, United Technologies Corporation is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Ashland Chemical is an Ohio corporation and may be served with process through their agent for service, The Corporation Trust Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Ashland Oil is a Kentucky corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Kerr-McGee Chemical Co. is a Delaware corporation and may be served with process through their agent for service, Russell G. Homer, Jr., 123 Robert S. Kerr, Oklahoma City, Oklahoma 73125, by certified mail, return receipt requested.

Shell Oil Company is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Spray-On Systems, Inc. is an Ohio corporation and may be served with process through their agent for service, Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Sherwin-Williams is an Ohio corporation and may be served with process through their agent for service, Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Magnaflux Corporation is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange, Wilmington, Delaware 19801, by certified mail, return receipt requested.

McGean-Rohco, Inc., formerly known as McGean Chemical Company, Inc. is an Ohio corporation and may be served with process through their agent for service, John D. Drinko, 1900 East 9th St., Suite 3200, Cleveland, Ohio 44114, by certified mail, return receipt requested.

Cee Bee Chemical, a Division of McGean-Rohco, Inc. is an Ohio corporation and may be served with process through their agent for service, Willie R. Smith, 9520 Cee Bee Drive, Downey, California 90241, by certified mail, return receipt requested.

Cee Bee Chemicals, Inc. is an Ohio corporation and may be served with process through their agent for service, Kerry H. May, 50 Public Square, Suite #1250, by certified mail, return receipt requested.

Met-L-Chek Company is a California corporation and may be served with process through their agent for service, William E. Mooz, 1639 Euclid Street, Santa Monica, California 90404, by certified mail, return receipt requested.

Octagon Process, Inc. is a New Jersey corporation and may be served with process through their agent for service, Morrill J. Cole, 25 Main Street, Hackensack, New Jersey 07602, by certified mail, return receipt requested.

Plaze, Inc. is a Missouri corporation and may be served through their agent for service, John Ferring, 9401 Watson Industrial Park, St. Louis, Missouri 63126, by certified mail, return receipt requested.

Royal Lubricants Company, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209

Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Solvents & Chemicals, Inc. is a Texas corporation and may be served with process through their agent for service, M.B. Merrill, 5433 Westheimer, Suite 700, Houston, Texas 77756, by certified mail, return receipt requested.

Steco, Inc. is a Delaware corporation and may be served with process through their agent for service, Corporation Service Company, 1013 Center Road, Wilmington, Delaware 19805, by certified mail, return receipt requested.

Tapmatic Corporation is a California corporation and may be served with process through their agent for service, Maxine White, 802 Clearwater Loop, Post Falls, Idaho 83854, by certified mail, return receipt requested.

Thompson & Formby, Inc. is a Florida corporation and may be served with process through their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324, by certified mail, return receipt requested.

L&F Products, Inc. is a Delaware corporation and may be served with process through their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324, by certified mail, return receipt requested.

Minwax Company, Inc. is a New Jersey corporation and may be served with process through their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324, by certified mail, return receipt requested.

Truflex Rubber Products Company is a California corporation and may be served at their corporate address, 1667 North Main Street, Los Angeles, California 90012 pursuant to Fed.R. Civ. P. Rule 4(d).

Break-Free, Inc. is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Detroit Diesel-Allison Canada East, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Loctite Corporation is a Delaware corporation and may be served with process through their agent for service The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Southwest Petro-Chem, Inc. is a Delaware corporation and may be served with process through their agent for service The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

W.M. Barr & Co., Inc. is a Tennessee corporation and may be served with process through their agent for service, Bruce F. Doane, 2105 Channell, Memphis, Tennessee 38113, by certified mail, return receipt requested.

The Dow Chemical Company is a Delaware corporation and may be served with process through their agent

for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Dow Industrial Service of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Dow Division of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Brazos Oil & Gas of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

3M Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Minnesota Mining and Manufacturing Company is a Delaware Corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Vulcan Materials Company is a New Jersey corporation and may be served with process through their agent for service The Prentice Hall Corporation System, 115 SW 89th Street, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Monsanto Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Mallinckrodt Group, Inc., formerly known as Imcera Group, Inc. is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Diamond Shamrock Corp. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Diamond Shamrock Corp. a/k/a Occidental Electrochemicals, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

El Dorado Chemical Co., Inc. is an Oklahoma corporation and may be served with process through their agent for service, Rosenstein, Fist & Ringold, 525 South

Main, Suite 300, Tulsa, Oklahoma 74103, has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Amco Chemical Corp. is a Texas corporation and may be served with process through their agent for service, J. Melton McCrary, 6123 England, Houston, Texas 77021 by certified mail, return receipt requested.

Solvent Chemical Company, Inc. is a Delaware corporation and may be served with process through their agent for service, Dummy Agent Account, Secretary of State Townesend Building, Dover, Delaware 19901, by certified mail, return receipt requested.

Fisher Chemical is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L100, Dover Delaware 19904 by certified mail, return receipt requested.

Allied Corporation is a New York corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Alliedsignal, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Asbesco, Inc. is an Alabama corporation and may be served with process through their agent for service, Elizabeth P. Mason, 3654 Halls Mill Road, Mobile, Alabama 36619, by certified mail, return receipt requested.

Norton Company is a Massachusetts corporation and may be served with process through their agent for service, C.T. Corporations Systems, 2 Oliver Street, Boston, Massachusetts 02019, by certified mail, return receipt requested.

Exxon Corporation is a New Jersey corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Exxon Chemical is a New Jersey corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

CSD, Inc. is an Oklahoma corporation and may be served with process through their agent for service, Benjamin J. Curtis, 900 Broadway, Suite #3, Poteau, Oklahoma 74953, by certified mail, return receipt requested.

Chem-Tronics, Inc. is a California corporation and may be served with process through their agent for service, The Prentice Hall Corporation Systems, Inc., 115 S.W. 89th St., Oklahoma City, Oklahoma 73139, by certified mail, return receipt requested.

Federal-Mogul Corporation is a Michigan corporation and may be served with process through their agent

for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Mobil Oil Corporation is a New York corporation and may be served with process through their agent for service, The Prentice Hall Corporation Systems, Inc., 115 S.W. 89th Street, Oklahoma City, Oklahoma 73139, by certified mail, return receipt requested.

Ameron, Inc. is a California corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Safety-Kleen Corporation is a Wisconsin corporation and may be served with process through their agent for service The Prentice Hall Corporation System, Inc., 115 S.W. 89th Street, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

CSB, Inc. is an Oklahoma Corporation and may be served with process through their agent for service, Homer Paul, 109 N. Armstrong, Bixby, Oklahoma 74008, by certified mail, return receipt requested.

DeVoe and Reynolds Company, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Blazer East, Inc., formerly known as Koppers Company, Inc. is a Delaware corporation and may be served

with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Saran Protective Coatings Co. is a Michigan corporation and may be served with process through their agent for service, Noel Smith, 17332 Shields, Detroit, Michigan 48212, by certified mail, return receipt requested.

Seymour of Sycamore, Inc. is an Illinois corporation and may be served with process through their agent for service, S.M. Heatley, 917 Crosby Ave., Sycamore, Illinois 60178, by certified mail, return receipt requested.

Amjay Corporation is a Texas corporation and may be served with process through their agent for service, G.V. Kshatriya, 11490 Westheimer, Suite 290, Houston, Texas 77077, by certified mail, return receipt requested.

Dexter Corp. is a Delaware corporation and may be served with process through their agent for service, The Company Corporation, 3 Christina Center, 201 N. Walnut St., Wilmington, Delaware 19805, by certified mail, return receipt requested.

Uni-Kem International, Inc. is a Louisiana corporation and may be served with process through their agent for service, J. Inchauspegul, 513 Hickory Ave., Harahan, Louisiana 70123, by certified mail, return receipt requested.

Miller-Stephenson Chemical Company Inc., formerly known as Miller-Stephenson Company of Conn., Inc. is a Connecticut corporation and may be served with process through their agent for service, George M. Stephenson,

George Washington Highway, Danbury, Connecticut 06810, by certified mail, return receipt requested.

Bel-Ray Company, Inc. is a New Jersey corporation and may be served with process through their agent for service, Daryl Brosnan, Bowman Ave., P.O. Box 526, Farmingdale, New Jersey 07727, by certified mail, return receipt requested.

Pacific Grinding Wheel, Inc. is a New Jersey corporation and may be served with process through their agent for service, Donald L. Tischer, 13120 Highway 99, Marysville, Washington 98270, by certified mail, return receipt requested.

Speedcut, Inc., is an Illinois corporation and may be served with process through their agent for service, Martha R. Roper, 2500 Latham St., Rockford, Illinois 61103, by certified mail, return receipt requested.

LHB Industries is a Missouri corporation and may be served with process through their agent for service, Joseph Von Kaenel, 1 Metropolitan Square 2600, St. Louis, MO 63102, by certified mail, return receipt requested.

Crawford Laboratories, Inc. is an Illinois corporation and may be served with process through their agent for service, Benjamin Shmetterer, 4165 So. Emerald, Chicago, Illinois 60609, by certified mail, return receipt requested.

Sherwin, Incorporated is a California corporation and may be served with process at their corporate address, Mr. A.G. Sherwin, 5530 Borwick Ave, Southgate, CA 90280 pursuant to Fed.R.Civ.P. Rule 4(d).

Cabot Corporation is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 115 S.W. 89th, Oklahoma City, Oklahoma 73139, by certified mail, return receipt requested.

Cabot Oil & Gas Marketing Corporation is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Cabot Oil & Gas Corporation is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Brent America, Inc., formerly Brent Chemicals Corporation, is a Delaware Corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange St. Wilmington, Delaware 19801, by certified mail, return receipt requested.

Chemical Commodities Agency is a California corporation and may be served at their corporate address, 27447 Pacific Street, Highland, California 92346, Attention: Richard Simon, pursuant to Fed. R. Civ. P. Rule 4(d).

Packaging Service Co., Inc. is a Texas corporation and may be served with process through their agent for service, Gabriel J. Baizan, 929 So. Shaver, Pasadena, Texas, by certified mail, return receipt requested.

Penetone Corporation, formerly known as W.C.P. Industries, Inc., is a New Jersey corporation and may be

served with process through their agent for service, Prentice-Hall Corporation Systems/NJ, 830 Bear Tavern Road, West Trenton, New Jersey, by certified mail, return receipt requested.

Continental Chemical Co, Inc. is a Delaware corporation and may be served with process through their agent for service, Prentice Hall Corporation Systems, Inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Borden, Inc., formerly known as the Borden Company, is a New jersey corporation and may be served with process through their agent for service, Edwin K. Large, Jr., 117 Main St., Flemington, NJ 08822, by certified mail, return receipt requested.

ITW Fluid Products Group, a Division of Illinois Tool Works, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Illinois Tool Works, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Pratt & Lambert United, Inc. formerly Pratt & Lambert, Inc. is a New York corporation and may be served with process at their corporate office. 73-97 Tonawanda Street, Buffalo, New York 14207 pursuant to Fed. R. Civ. P. 4(d).

Beecham HIP, Inc., formerly Beecham Home Improvement Products, formerly Beecham Home Improvement Products, Inc., formerly Remwell, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Polymeric Systems, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

DeSoto, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Co., 1209 Orange Street, Wilmington, Delaware 19801, by certified fail, return receipt requested.

Vulcan Chemical Company, Inc. is an Alabama corporation and may be served with process through their agent for service The Prentice Hall Corporation Company, 115 SW 89th St., Oklahoma City, OK 73102, by certified mail, return receipt requested.

Phipps Products, a Division of Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

The court has determined that there is jurisdiction for this cause of action. However, Plaintiffs disagree and contest jurisdiction of this Court and again request that

the case be remanded to the 60th Judicial District Court, Beaumont, Jefferson County, Texas.

III.

Plaintiffs bring this action because of the personal injuries and damages of Plaintiffs herein for toxic chemical, solvent, mineral and metal exposure. Plaintiffs would show that all Plaintiffs were exposed to these chemicals, solvents, minerals and metals while working at Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiffs would show that said chemicals, solvents, minerals and metals were manufactured or provided by one or more of the named Defendants. (The chemicals, solvents, minerals and metals include but are not limited to, cobalt, cadmium, chromium, Freon TF solvent, Freon PCA, RTV 108, RTV 106, Copper, Iron, Lanthanum, Manganese, Molybdenum, Nickel, Silicon, Vanadium, Tungsten, Zirconium, Yttrium, Aluminum, Titanium, Boron, Columbium, Tantalum, Silver, Zinc, Tin, Tin, PWA1317, PWA1306, PWA1307 D, Carbon, Trichloromethane, ADH Powder, Grizeldalloy-0001, AMS 4782, Haynes 188, 1,2,2-Trifluoroethane, 1,1,2-Trichloro 1,2,2-Trifluoroethane (Freon 113), 113 Trichlorotrifluoroethene, Methyl Chloroform, Dichlorodifluoromethane, Methylene Chloride, Methyl Ethyl Ketone, Methyl Ethyl Ketone (2-Butanone), Xylene, Xylene (O-,M,P-Isomers), Ethyl Benzene, Toluene, Methyl N-Propyl Ketone, Methyl Isobutyl Ketone, Dichloromethane, 1,1,1-Trichloroethane, 1-1-1 Trichloroethane, Freon TF, Trichlorotrifluoroethane, Cyclohexane, Methyl N-Amyl Ketone, Dichloromethane, Technical, Orthdichlorobenzene, Dry Cleaning Solvent, Trichloroethylene, Tetrachloroetheylene, Toluene MIBK, Toluene

Tech, 1,1,1-Trichloroethan, Toluene ACS Perchloroethylene, MEK Peroxide, Monochlorodifluoromethane, Monochlordifluoromethane, Dichlorotetrafluoromethane, Trichloromonofloromethane, Trichlorotrifluoromethane, Monochlorotrifluoromethane, Bromochlorodifluoromethane, Chiorodifluoromethane, Trichloromonofluoromethane, asbestos, silica, and Tetrachloroethylene, and Freon with additives) Plaintiffs would further show that General Electric Company, Pratt & Whitney Company Inc., Detroit Diesel-Allison Canada East, Inc., and United Technoligies Corporation provided jet engines to Tinker Air Force Base which were worked on, grinded on, reworded and repaired by the above-referenced Plaintiffs. The engines involved include but are not limited to J57, J79, TF30, TF33, TF41, F101, F108, F110 and all derivatives and models of those engines (For example – P5, P7, P11, P100, etc.) Each Plaintiff listed above was exposed to these chemicals, solvents, minerals and metals, and their fumes while working on these jet engines and jet engine parts in the course and scope of their employment at Tinker Air Force Base. These Plaintiffs worked on the jet engines by cleaning, grinding, reworking, and being generally exposed to the chemicals, solvents, minerals and metals while performing their work. The jet engine manufacturers also required, recommended and/or suggested certain of these hazardous chemicals, solvents, minerals and metals to be used in the cleaning, grinding and reworking of their engines.

IV.

Plaintiffs would show that each of the above-referenced Plaintiffs are or have been employed at Tinker Air

Force Base and were exposed to significant amounts of chemicals, solvents, minerals and metals. Plaintiffs were exposed to the chemicals, solvents, minerals and metals without any warning of the true danger and hazards of them or their potential for causing adverse health effects. Plaintiffs would show that such chemicals, solvents, minerals and metals were designed, formulated, manufactured and distributed by the above-named Defendants; and they violated the terms and provisions of Section 402A and 402B of the Restatement of Torts (2nd). Plaintiffs allege defective manufacturing, design and marketing. These Defendants are strictly liable for these defective products which were the producing, proximate, and/or contributing cause of these Plaintiffs' injuries.

V.

Plaintiffs would show that these Defendants were negligent and grossly negligent in one or more of the particulars with regard to warnings:

(1) In providing no warnings regarding the defective nature of the solvents and chemicals, or alternatively, providing inadequate warnings to the ultimate users, these Plaintiffs.

(2) In failing to take reasonable measures to ensure that appropriate warnings were given to individuals at Tinker Air Force Base so that the ultimate users, these Plaintiffs, would be aware of the dangers and hazards related to the use of these chemicals, solvents and metals.

All of the above were a proximate or producing cause of Plaintiffs' injuries and damages.

VI.

Plaintiffs would also show that the chemicals, solvents, minerals, defective protective gear, and metals sold and distributed by these Defendants were defectively marketed and that such defective marketing was a proximate, producing and/or contributing cause of Plaintiffs' damages. Specifically, there was an inherent risk of harm that could be reasonably anticipated from the use of these products while cleaning, reworking and grinding on jet engine parts. In fact, the jet engine manufacturers required, recommended and/or suggested certain of these products to be used without any warning concerning the dangers and hazards of these products on their jet engines when they knew or should have known the risk of harm to these Plaintiffs. In addition, the jet engine manufacturers had their own employees on the premises of Tinker Air Force Base that were in a position to know about the dangers of using these hazardous chemicals, solvents, minerals, defective protective gear, and metals, as well as the dangerous levels of heavy metal dust created from the work performed on these engines, and yet these Defendants still failed to warn these Plaintiffs or anyone at Tinker Air Force Base concerning the health hazards related to the use of these chemicals, solvents, minerals, defective protective gear and metals. The absence of warnings or inadequate warnings was a producing, proximate, and/or contributing cause of these Plaintiffs' injuries and damages. Plaintiffs also would show that these chemicals, solvents, minerals, defective

protective gear, and metals were defectively manufactured and designed and such were made unreasonably dangerous to these Plaintiffs. Plaintiffs would also show that their employer, the United States Government, did not specify a particular design to these defendants that was peculiar to the United States Government, but designs that were also sold and distributed commercially by these Defendants as well.

VII.

The Plaintiffs would also show that these Defendants were negligent and grossly negligent in the manufacture, design, marketing, sale and distribution of these jet engines, chemicals, solvents, defective protective gear, and minerals. The additional acts and omissions of all of these Defendants, which make them liable to these Plaintiffs for negligence and gross negligence are as follows:

(1) In failing to warn these plaintiffs of the health hazards in using these chemicals, solvents, minerals, defective protective gear, and the metal dust created when working on these engines and the use of the chemicals, solvents and minerals on the jet engines.

(2) In failing to warn the employer of these Plaintiffs as to the health hazards of these chemicals, solvents, minerals and the metal dust created when working on these engines.

(3) In failing to properly test these chemicals, solvents and minerals to determine the dangerousness of them.

(4) In failing to give proper instruction with regard to the use of these chemicals, solvents, defective protective gear, and minerals so that they could be used safely, if at all.

(5) In failing to determine the exact use and application of these chemicals, solvents and minerals so that additional warnings and instructions could be issued to either the employer or the Plaintiffs themselves.

(6) In failing to conduct proper industrial hygiene studies to determine the dangerousness and toxicity to humans with regard to these chemicals, solvents and minerals and from the metal dust created from working on these jet engines.

(7) In selling these chemicals, solvents, minerals and engines when they knew or should have known of the dangers regarding the use of solvents, chemicals, and minerals on the jet engines and in general use.

(8) In selling these solvents, chemicals, minerals and engines without requiring warnings to be made to these plaintiffs about health hazards regarding the use of them singularly or together.

(9) In representing that these chemicals, solvents, defective protective gear, and minerals were safe for use in the application in which they were made.

(10) In not representing all dangers related to these chemicals, solvents and minerals on the MSDS sheets, which is a violation of Law.

(11) In failing to insure that the Plaintiffs and Plaintiffs' employers were properly and adequately warned regarding the use of these chemicals, solvents, defective protective gear, and minerals in general or on these jet engines.

(12) In providing these chemicals, solvents, defective protective gear, and minerals when these Defendants knew or should have known that they were inherently unsafe for their intended use.

(13) In failing to test these chemicals, solvents and minerals with regard to bio-compatibility.

(14) In failing to test these chemicals, solvents and minerals for tissue reactions, neurological effects, respiratory effects and any other negative health effects.

(15) In failing to take reasonable measures to prevent the improper use of these chemicals, solvents and minerals or the use of them in an unsafe manner on these jet engines or in general.

(16) In maintaining a corporate policy of silence and disassociation concerning the known dangers of these chemicals, solvents and minerals and the heavy metal dust created from working on these jet engines.

(17) In allowing the ultimate users to believe that these chemicals, solvents and minerals were safe when they knew they were not.

(18) In not performing radiation tests or studies to determine the radiation exposure to these plaintiffs in working on these jet engines when grinding and/or reworking or with a combination of the chemicals, solvents and minerals.

(19) In allowing the Plaintiffs to be exposed to dangerous levels of radiation.

(20) In failing to warn of health effects from radiation exposure to these jet engines while these Plaintiffs worked on them.

(21) In failing to warn of the synergistic effect of the chemicals, solvents, and minerals with the heavy metal dust, or with each other.

(22) In failing to warn of the proper protective gear to wear when working with the chemicals, solvents, minerals, and metals.

(23) In providing defective or inadequate protective gear in order to protect against the dangers of these chemicals, solvents, minerals, and metals.

(24) In failing to inform these Plaintiffs of the dangerous levels of heavy metal dust created when working on these jet engines.

All of these acts and/or omissions, either singularly or in combination, were the proximate, producing, and/or contributory cause of these Plaintiffs' injuries and damages.

VIII.

The jet engine manufacturers were also negligent and grossly negligent in recommending, suggesting, or requiring certain of these chemicals, solvents, protective gear, and minerals to be used on their jet engines or parts when they knew or should have known that they were dangerous without giving proper warnings. These jet engine manufacturers were also negligent and grossly negligent in failing to warn of the danger involved in grinding and reworking on their engines, and the dangers associated with the heavy metals dust created and the danger of using certain solvents, chemicals and minerals used to clean or work on them.

IX.

The jet engine manufacturers were also negligent and grossly negligent through their employees who were on the premises of Tinker Air Force Base in failing to warn these Plaintiffs about the dangers of the heavy metal dust created from their reworking and grinding operations, as well as the use of these dangerous chemicals, solvents and minerals that were required by these jet engine manufacturers in the cleaning, x-ray, grinding and reworking process of these jet engines and jet engine parts. These Plaintiffs also plead that the jet engine manufacturers had a right of control of these Plaintiffs, and breached the duty to properly protect and insure their safety since these manufacturers had expertise, knowledge and location on the premises at Tinker Air Force Base, and yet failed to warn and/or protect these plaintiffs. These negligent and grossly negligent acts were a producing,

proximate, and/or contributing cause of the Plaintiffs' injuries and damages.

X.

Plaintiffs would also show that these Defendants were negligent per se in that they violated various federal regulations concerning the labeling and/or publication of MSDS sheets which did not include full disclosure concerning the dangerousness of these chemicals, solvents and minerals and the use of these chemicals, solvents and minerals on these jet engines. Plaintiffs would show that they were in the group of persons who were intended to be protected by these statutes and regulations. The violations of these statutes, either singularly or collectively, constitute negligence per se. The Defendants' violations of these statutes and regulations were a proximate and/or producing cause of Plaintiffs' injuries. Plaintiffs would also show that these Defendants were negligent and violated the provisions of the Restatement 2nd of Torts Section 388 in supplying chemicals, solvents, defective protective gear, minerals and in selling jet engines and requiring, recommending, or suggesting certain dangerous chemicals, solvents and minerals to be used on these jet engines when these Defendants knew or had reason to know that the use of these chemicals, solvents, defective protective gear, and minerals were dangerous for the use for which they were being supplied and when they had no reason to believe that these Plaintiffs would realize the dangerous conditions of these chemicals, solvents, defective protective gear and minerals or the danger of the heavy metal dust emitted during the grinding

and reworking operations or in the use of these chemicals, solvents and minerals on these jet engines.

XI.

These Plaintiffs would also show that these Defendants impliedly warranted that their products, whether they be jet engines, protective equipment, chemicals, solvents and minerals were reasonably fit for the ordinary purposes for which they were intended to be used and would pass without objection in the trade or under its description. However, this warranty was breached since these products were not fit for the ordinary purposes for which they were intended to be used. This breach of implied warranty caused severe health problems for these Plaintiffs. These Defendants knew that their products were not merchantable when they were sold to Tinker Air Force Base and the various distributors in which they used for the distribution of their products. Defendants are also liable for breach of express warranties. These Defendants expressly warranted that their products were safe for use in jet engine repair, cleaning and re-working. These Plaintiffs would show that the breach of implied and express warranties were the proximate cause, if not the sole cause, of these Plaintiffs' injuries and damages. Plaintiffs would further show that these Defendants violated Sections 2.313, 2.314 and 2.315 of the Uniform Commercial Code since these products manufactured, sold and distributed by these Defendants were not of the quality, grade or description that these Defendants represented. All of these breach of warranties and misrepresentations were the proximate, producing, and/or

contributing cause of these Plaintiffs' injuries and damages.

XII.

Plaintiffs also plead violations of the provisions of the Oklahoma Deceptive Trade Practices Act, including, but not limited to, section 53 a (1-11), b and c, Section 54 a, b, c and d. Plaintiffs would show that the deceptive acts by all of these Defendants were the proximate, producing, and/or contributing cause of these Plaintiffs' injuries and damages. Plaintiffs would also show that these deceptive acts were committed knowingly, and these Plaintiffs are entitled to exemplary damages for these knowing acts.

XIII.

These Plaintiffs would also show that one or more of these Defendants engaged in fraud and/or fraudulent concealment concerning safety information, which by federal regulation should have been contained in the material safety data sheets (MSDS) and in concealing the true dangers of these chemicals, solvents, defective protective gear, minerals and heavy metal dust created from these jet engines. These fraudulent acts were a producing, proximate, and/or contributing cause of these Plaintiffs' injuries and damages.

XIV.

Plaintiffs would show that the grinding, reworking and use of solvents on these jet engines generally were

and are ultra-hazardous activities and these Defendants should be strictly liable to these Plaintiffs for these injuries and damages pursuant to the Restatement of Torts (2d).

XV.

The Plaintiffs would show that their exposures to these chemicals, solvents, minerals, defective protective gear, and metals have existed for many years and have continued up until the present creating new injuries on almost a daily basis.

XVI.

The injuries and damages caused by the acts of these Defendants as stated above, caused these Plaintiffs irreversible brain damage, upper respiratory disease, dermatitis, bronchitis, emotional problems, heart disease, central nervous system disorders, and various other medical problems.

XVII.

Plaintiffs would further plead a cause of action for fear of and increased risk of brain disorders, cancer, and other diseases as a result of the exposure to the above-referenced chemicals, solvents, minerals and metals.

XVIII.

Plaintiffs further sue all Defendants for the physical pain and suffering, disfigurement, and impairment that

these Plaintiffs have suffered as a result of these injuries. Additionally, Plaintiffs sue for recovery of damages herein for physical pain and suffering, disfigurement, and impairment which they will endure for the remainder of their lives.

XIX.

Plaintiffs further sue all Defendants for reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question. Additionally, Plaintiffs further sue for reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future and for reasonable medical and hospital expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

XX.

Plaintiffs further sue all Defendants for loss of earnings which Plaintiffs have sustained up until the time of trial. Additionally, Plaintiffs further sue for the loss of reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future.

XXI.

Plaintiffs would show that they sustained mental anguish of an almost incalculable nature including the obvious mental anguish which necessarily accompanies any type of brain disorder, and fear of contracting brain

disorders, cancer or fear of contracting cancer and other diseases as a result of their exposure to the above-referenced products. Plaintiffs also sue all Defendants for the mental anguish they will suffer for the remainder of their lives. Accordingly, Plaintiffs sue for a sum of money which will reasonably compensate Plaintiffs for their damages resulting from the occurrence in question as follows:

1) Physical pain which the Plaintiffs have suffered up until the time of trial;

2) Mental anguish which the Plaintiffs have suffered up until the time of trial;

3) Reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question;

4) Loss of earnings which Plaintiffs have sustained up until the time of trial;

5) Physical impairment which Plaintiffs have suffered up until the time of trial;

6) Disfigurement which Plaintiffs have suffered up until the time of trial.

7) Loss of enjoyment of life.

8) Fear of cancer/brain disorders and increased risk of cancer/brain disorders.

XXII.

The Plaintiffs also sue for the following elements of damages which Plaintiffs will sustain in the future from the time of trial as a result of the exposures made the basis of this lawsuit.

1) Physical pain and suffering which Plaintiffs will, in reasonable probability, suffer in the future;

2) Mental anguish which Plaintiffs will, in reasonable probability, suffer in the future;

3) Reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future;

4) The loss reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future;

5) The damages which result from the physical impairment which Plaintiffs will continue to suffer in the future and the inability to perform those tasks and services which they ordinarily would perform in the future;

6) The disfigurement which Plaintiffs will continue to suffer in the future.

7) The reasonable expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

8) Loss of enjoyment of life.

9) Fear of cancer and increased risk of cancer.

XXIII.

The Plaintiffs will prove upon trial of this cause, they have sustained damages as a direct and proximate result of the negligence, gross negligence, violations of the applicable products liability laws, ultra-hazardous activity, fraud, fraudulent concealment, negligence per se and

deceptive trade practices which were all a producing, proximate, and/or contributing cause or result of such damages and request that judgment be entered against all of these Defendants in the amount of four hundred million ($400,000,000) in actual damages to these Plaintiffs.

XXIV.

Plaintiffs would show that Defendants were aware of the defects in their products. Therefore, this conscious decision to permit the products to be used by workers at Tinker Air Force Base without adequate warnings or precautions and in a defective condition constitutes a wanton, willful disregard for the rights of Plaintiffs which renders Defendants liable to Plaintiffs for exemplary damages. The amount of exemplary damages plaintiffs plead for is eight hundred fifty million ($850,000,000).

XXV.

Plaintiffs further claim prejudgment and post judgment interest at the maximum rate allowed by law and for attorneys' fees pursuant to the Oklahoma Deceptive Trade Practices Act.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein as the law directs, and that upon final hearing, Plaintiffs have and recover judgment of and from these Defendants, both jointly and severally, in the sum of FOUR HUNDRED MILLION AND NO/100 DOLLARS ($400,000,000.00) IN ACTUAL DAMAGES, eight hundred fifty million and no/100 dollars ($850,000,000.00) in

exemplary damages, costs of court, prejudgment and post-judgment interest, and attorneys' fees which may be authorized by law, and for such other and further relief, both general and special, at law and in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

HOLLOWAY, DOBSON, HUDSON & BACHMAN
Ste 900, One Leadership Square
211 N. Robinson
Oklahoma City, Oklahoma 73102-7102

BY: /s/ Steve Bachman
GARY BACHMAN
State Bar No. 400
STEVE BACHMAN
State Bar No. 14030
DAN HOLLOWAY
State Bar No. 10341

WELLER, GREEN, MCGOWN & TOUPS, L.L.P.
550 Fannin, Suite 500
Beaumont, Texas 77701
(409) 838-0101
(409) 838-6780 (Fax)

BY /s/ Mitchell A. Toups By SDB
MITCHELL A. TOUPS
Texas State Bar No. 20151600
E. HART GREEN
Texas State Bar No. 08349290
DENNIS REICH
Texas State Bar No. 16739600
ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff respectfully requests a trial by jury.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was delivered to all counsel of record by regular and/or certified mail, return receipt requested, on this the 3rd day of Oct, 1994.

/s/ Stephen D. Bachman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES E. AKIN, RICHARD G. ARELLANO, CHARLES L. BALDWIN, ANNIE M. BARNES, MARCIA BRANNOCK, DELTON BROWN, GARY BURWELL, TIMOTHY CARAWAY, THOMAS W. CLARK, DAVID CLAUSEN, RICHARD COTEY, CONNIE COTTRELL, RONNIE D. COTTRELL, STEVEN L. COY, HUGH CROW, NATHAN D'AMICO, EDDIE R. DANNA, JR., DONNA M. DAVIS, LEANDRA DEMOSS, ORVILLE DESHIELDS, LOUIS R. DICKINSON, OLLIE DILLISHAW, JR., DANNY DRISKILL, EDDIE DUCK, JR., DANNY DUNN, JENNY L. DUREN, BILL R. DURINGTON, DORIS BROWN DURLIN, STEPHEN RAY DUTY, LEON EALON, LARRY ELLIOTT, DEBRA M. EMERICH, JANETTE K. FARLEY, LLOYD FREED, JON G. GABBARD, DEBRA HALL GABBARD, LINDA D. GATEWOOD, LANCE GILLEY, MAX R. GLOVER, WENDELL GLOVER, JAMES GOFF, WENDELL GOMEZ, JOHN C. GOULD, PHYLLIS J. GOULD, REGINA G. GRISSAM,	§	Case No. CIV-94-832-C

KENNETH O. HART, MICHAEL §
HAWKINS, EDGAR HOUSTON, §
GERALD HOUSTON, §
VALENCIA HOWELL, RALPH V. §
ICE, RAY IRVAN, ERIC L. §
JANOUSEK, DAVID KEISER, §
BILLY B. KING, LARRY D. §
LIDELL, DAVID LOVE, ROBERT §
C. LOVE, JIMMY LYNCH, §
THOMAS MARSHALL, JAMES §
MCLANE, MICHAEL D. §
MOWLES, JEFFREY MURRAY, §
MELVIN E. NORTON, §
ZENEPHOR OVERSTREET, §
JAMES M. OWEN, TERRY W. §
OXLEY, RONALD K. PEOPLES, §
MICHAEL PHILLIPS, LOUISE §
PICKARD, MARIE L. PLUMLEE, §
PHILLIP PLUMLEE, RICK §
REAMES, SARAH REESE, JACK §
D. RHODEN, OTHA L. §
RHODEN, WAYNE §
RICHARDSON, DOROTHY §
RIMBOLD, TIJUANA §
ROBINSON, ALINE ROCKWELL, §
CHARLON S. ROGERS, §
SANDRA ROLLAND, MARLYS §
RONE, TONY E. RUBLE, MARY §
SAYRE, REATHA R. SCHLEGEL, §
GLORIA SHELTON AS §
REPRESENTATIVE OF THE §
ESTATE OF WILTON F. §
SHELTON, DECEASED, §
CHARLIE SHEPPARD, HERMAN §
D. SIKES, TERRY SIMPSON, §
WILLIAM D. SLATTERY, LARRY §

SMITH, KENNETH SNYDER, §
JESS STANLEY, CLAYTON D. §
STASTNY, MELISSA C. §
STASTNY, GAYLA S. STATON, §
MARTHA J. STOROZYSZYN, §
RICK L. STUART, JAMES §
SYKES, EMMETT THOMAS, JR., §
BENJAMIN TINGLE, MARILYN §
J. TRACEY, GARY VESSELL, §
HELEN WALKER, WILLIAM §
WARD, NOREEN WELCH, §
GEORGE WEST, RANDY F. §
WIENS, LEONARD WILLIAMS, §
MORTEN D.WILLIAMS, LINDA §
WILLIS, GLENDA WRIGHT, §
HERMAN DALE WRIGHT, §
KENNETH L. WRIGHT, ALBERT §
A. WYATT, JAMES D. WYATT, §
JOHNNIE R. YORK, LOIS §
AYERS, TERRY BRUNER, §
FLOYD BURELSON, CHRISTY §
CANNON, MARK CHISHOLM, §
BILLIE COCHRAN, DELORES §
COLEY, VIRGIL W. CLARK, §
JAMES CROOM, MARY §
DODSON, SAUNDRA §
DUNCAN, JIMMY EASTON, §
DONALD FLATT, JAMES §
HENDERSON, DAVID HIGGINS, §
CATHY KALER, DEBRA §
KELLOGG, RUSSELL KINNEY, §
PHYLLIS KNOTT, LANDY §
LANCASTER, JERRY LUM, §
JACK MCSWAIN, JAMES §
MESSICK, DANIEL MOODY, §
JACK OBLANDER, PATRICIA §
ORR, DAVID PARRIS,

HELEN PAYNE, VIRGINIA §
PERRY, WINFRED PLUNKETT, §
DEBRA SANDERS, THOMAS §
SANDERS, ORIN SHAW, ZEFFIE §
SWANEGAN, GEORGE §
THORPE, LONNIE TRAMMELL, §
PEGGY WALTON, CLINTON §
WILBURN, DANIEL WILLIAMS, §
RICHARD WILLIAMS, AND §
BARBARA YOTT DEBRA COY, §
DAVID DESELMS, WILLIAM §
DUNLAP, MARILYN GAITLYN, §
JIMMY GATEWOOD, FRANCES §
HINDS, LAVEDA MONTAGUE, §
FRED STOCKTON, RONALD §
WILLIAMS, AND ROSETTA §
WILLIAMS, LINDA GALE §
ADKINS, DAVID R. §
ANDERSON, NICKEY ARDEN, §
WILLIAM C. ARMOUR, DANNY §
B. ATCHICO, LEON ATCHISON, §
MIKE DAILEY, JAMES F. §
BARNES, LINDA BATHE, §
DAVID BAUMANN, MADELINE §
BAYLISS, DENNIS BERKNESS, §
JOE H. BLACKWELL, GARY D. §
BLEDSOE, FREDDIE LEON §
BOLNER, KAREN L. BOYD, §
RICHARD E. BOYD, BOBBY D. §
BRADFORD, OTHA BREWER, §
RICHARD W. BROCK, JAMES E. §
BROOKS, BRENDA K. §
BURRIGHT, TERRY LEE §
BURRIGHT, HARRY F. BUTLER, §
JR., PAULA J. CAMERON, §
ARTHUR E. CARTER, JONI R. §

CHILDRESS, HELVEN D. §
CHRISTIAN, DELORES J. COBB, §
RONALD DEAN COLE, PAUL §
M. CRABTREE, NORMA JEAN §
CREECH, CRAMALIA P. CROSS, §
LOREN L. CROSS, CAREY L. §
DAILY, KATHERINE M. DAILY, §
ANTOINETTE DAVIS, RANDAL §
K. DAVIS, LOYD W. DESHAZO, §
ROSCOE E. ELLIOTT, §
DEBORAH JO ELLISON, §
WILLIAM L. ENGLE, ESTATE §
OF JESSE HOLSHOUSER, §
GEORGE EVANS, SHIRLEY A. §
EVANS, BILLY L. FARROW, §
GREGORY FILLMORE, BRENDA §
ANN FOUNTAIN, STEVE §
FOUST, RICKY W. FOWLER, §
DANIEL R. FRITTS, CAROL M. §
GAUNTT, JUSTIN GIPSON, §
MICHELLE GITTHENS, §
LAFAYETTE GLOVER, SR., §
MARY ANN GODOSKY, FRANK §
O. GOLDSMITH, DALE K. §
GRAHAM, HARRISON §
GRAYSON, FREDIE L. GREEN, §
LYNA E. GREEN, RANDELL §
GREEN, HAROLD E. GRIFFEY, §
JR., LARENCE H. GROVE, JR., §
ROBERT GUTHRIE, CLAUDE R. §
HALES, JOHN HALSTEAD, §
DAVID LEE HARDIN, CHARLES §
P. HARDING, ROBERT G. §
HARRIS, RAYMOND HEINKEN, §
BEVERLY HENNING, LORETTA §
J. HERNDON, BOBBY R. HILL, §

DONALD G. HODGE, JR., §
ROYCE S. HODGES, LINDA S. §
HOLT, JAMES HUMPHRIES, §
RANDALL INGMAN, JAMES §
JACOBS, IVORY S. JAMES, §
JOAN V. JAMESON, ROSA L. §
JENNINGS, ROLEY JOHNSON, §
R., DAVID E. JONES, RONALD §
E. KELLEY, LARRY D. §
KETCHAM, JOE A. KNOST, §
BUDDY M. KUHLMAN, GARY §
R. LARRISON, DAVID C. §
LINDLEY, CLARENCE E. LONG, §
MIKEY R. MCCLENDON, SR., §
MERLIN MCGARY, RALPH §
MARLIN, CARL A. MASKELL, §
RICHARD E. MICHAEL, RICKY §
D. MONTGOMERY, §
CLAUDETTA MOORE, §
JOHNNIE L. MOORE, TONY R. §
MOORE, LUGENE MORRIS, §
JOHN G. NICHOLAS, III, §
LARRY R. NICKELL, MARY J. §
NIXON, FLOYD D. DENNIS §
OSBORN, NORBERT A. OTTKE, §
KENNETH O. OWEN, ROGER §
OXFORD, JANETTE D. §
PALMOUR, EARL D. PARKER, §
DONALD L. PATTERSON, §
ALLEN D. PEERY, JESSE D. §
PLUNKETT, JR. (SARAH), §
RICKY E. REDMAN, ERNEST E. §
RIDLEY, JR. (FLOSSIE), §
DOUGLAS P. RIEMER, JUDY A. §
ROWLAND, LAWANDA §
SCHANE, LARRY G. SCHMIDT, §

RONALD K. SCHORNICK,	§
EVELYN SCHUESSLER, LOUISE	§
SCHUGGS, MARILYN ANN	§
SEBEK, ROB SONNIER, JOHN	§
A. STALFORD, PAUL STEIN,	§
TERRY D. STEVENSON,	§
RICHARD S. STOLTZ, JOHNNY	§
STOOPS, LARRY STRICKLAND,	§
ROSETTA M. STROUD, MIKE	§
SULLIVAN, MICHAEL	§
SUMPTER, HERMAN SUTTON,	§
JR., BRENDA JOYCE	§
SWINDOLL, DELBERT L.	§
TAYLOR, RICHARD B.	§
THIELEN, WILLIAM P.	§
THOMAS, GAYLON D.	§
THOMPSON, GEORGE P.	§
THOMPSON, LARRY	§
THOMPSON, MARTIN B.	§
THOMPSON, MARVIN L.	§
TOOLATE, YVONNE J.J.	§
TRAYLOR, ROY L. VARNER,	§
KENNETH L. VICKERS,	§
FORREST N. WALKER,	§
MARGARET G. WARD, MARY	§
WARREN, CLIFFORD	§
WARRIOR, HARRELL W.	§
WEAVER, CARL JAMES	§
WILDER, FRANKLIN D.	§
WILLIAMS, M. C. WILSON, JR.,	§
CLEVELAND WIMBLEY, PAUL	§
L. WOLF, CLAUDE WOODY,	§
JR., DON A. YORK, SHARON J.	§
YORK,	§
	§
Plaintiffs/Intervenors	§

v. §

CHEMICAL SPECIALISTS & DEVELOPMENT INC., E. I. DUPONT de NEMOURS & COMPANY, INC., GENERAL ELECTRIC COMPANY, GTE PRODUCTS CORP., HAYNES INTERNATIONAL, INC., J. W. HARRIS Co., INC., METALLURGICAL TECHNOLOGIES INC., PRATT & WHITNEY COMPANY, INC., THUNDERBIRD SALES COMPANY, UNION CARBIDE CHEMICALS PLASTICS COMPANY, INC., UNITED TECHNOLOGIES CORPORATION, ASHLAND CHEMICAL, ASHLAND OIL, KERR-MCGEE CHEMICAL CO., SHELL OIL COMPANY, SPRAY-ON, SYSTEMS, INC., SHERWIN-WILLIAMS, MAGNAFLUX CORPORATION, MCGEAN-ROHCO, INC., formerly known as MCGEAN CHEMICAL COMPANY, INC., CEE BEE CHEMICAL, A DIVISION OF MCGEAN-ROHCO, INC., CEE BEE CHEMICALS, INC., MET-L-CHEK COMPANY, OCTAGON PROCESS, INC., PLAZE, INC., ROYAL LUBRICANTS COMPANY, INC., SOLVENTS & CHEMICALS, INC., STECO, INC., TARMATIC §

CORPORATION, THOMPSON & §
FORMBY, INC., L&F §
PRODUCTS, INC., MINWAX §
COMPANY, INC., TRU-FLEX §
RUBBER PRODUCTS COMPANY, §
BREAK-FREE, INC., LOCTITE §
CORPORATION, SOUTHWEST §
PETRO-CHEM, INC., W.M. §
BARR & CO., INC., THE DOW §
CHEMICAL COMPANY, DOW §
INDUSTRIAL SERVICE OF THE §
DOW CHEMICAL COMPANY, §
DOW DIVISION OF THE DOW §
CHEMICAL COMPANY, §
BRAZOS OIL & GAS OF THE §
DOW CHEMICAL COMPANY, §
3M COMPANY, MINNESOTA §
MINING AND §
MANUFACTURING COMPANY, §
MONSANTO COMPANY, §
MALLINCKRODT GROUP, INC., §
DIAMOND SHAMROCK CORP., §
DIAMOND SHAMROCK A/K/A §
OCCIDENTAL ELECTRO- §
CHEMICALS, INC., AMCO §
CHEMICAL CORP., SOLVENT §
CHEMICAL COMPANY, FISHER §
CHEMICAL, ALLIED §
CORPORATION, ALLIED- §
SINGAL, INC., NORTON §
COMPANY, EXXON §
CORPORATION, EXXON §
CHEMICAL, CSD, INC., CHEM- §
TRONICS, FEDERAL-MOGUL §
CORPORATION, MOBIL OIL §
CORPORATION, AMERON, §

INC., SAFETY-KLEEN §
CORPORATION, BLAZER EAST, §
INC., formerly known as §
KOPPERS COMPANY, INC., §
SARAN PROTECTIVE §
COATINGS CO., SEYMOUR OF §
SYCAMORE, INC., AMJAY §
CORPORATION, DEXTER §
CORP., UNI-KEM §
INTERNATIONAL, INC., §
MILLER-STEPHENSON, §
CHEMICAL COMPANY, INC. §
formerly known as MILLER- §
STEPHENSON COMPANY OF §
CONN., INC., BEL-RAY §
COMPANY, INC., PACIFIC §
GRINDING WHEEL, INC., §
SPEEDCUT, INC., CRAWFORD §
LABORATORIES, INC., §
SHERWIN, INCORPORATED, §
CABOT CORPORATION, BRENT §
AMERICA, INC., formerly §
known as BRENT CHEMICALS §
CORPORATION COMMODITIES §
AGENCY, PACKAGING §
SERVICE CO., INC., PENETONE §
CORPORATION, formerly §
known as W.C.P. INDUSTRIES, §
INC., CONTINENTAL §
CHEMICAL CO., INC., §
BORDEN, INC., formerly known §
as THE BORDEN COMPANY, §
ITW FLUID PRODUCTS GROUP, §
a Division of ILLINOIS TOOL §
WORKS, INC., ILLINOIS TOOL §
WORKS, INC., PRATT & §

LAMBERT UNITED, INC.,	§
formerly PRATT & LAMBERT,	§
INC., BEECHAM HIP, INC.,	§
formerly BEECHAM HOME	§
IMPROVEMENT PRODUCTS,	§
formerly BEECHAM HOME	§
IMPROVEMENT PRODUCTS,	§
INC., formerly REMWELL, INC.,	§
POLYMERIC SYSTEMS, INC.,	§
DESOTO, INC., and PHIPPS	§
PRODUCTS, a Division of DOW	§
CHEMICAL COMPANY,	§
	§
Defendants	§

COMPLAINT IN INTERVENTION

(Filed Dec. 07, 1994)

TO THE HONORABLE JUDGE OF SAID COURT:

COME now the Plaintiffs in Intervention and file this Complaint by and through their counsel of record, Holloway, Dobson, Hudson, Bachman, Alden, Jennings, Robertson & Holloway and Weller, Green, McGown & Toups. In support of their allegations these Plaintiffs in Intervention would state as follows:

I.

The Plaintiffs in Intervention moved this Court to Intervene into this case and the Court granted this Motion in the order attached hereto as Exhibit "A". The Plaintiffs now intervening in this case are as follows:

Linda Gale Adkins, David R. Anderson, Nickey Arden, William C. Armour, Danny B. Atchico, Leon

Atchison, Mike Bailey, James F. Barnes, Linda Bathe, David Baumann, Madeline Bayliss, Dennis Berkness, Joe H. Blackwell, Gary D. Bledsoe, Freddie Leon Bolner, Karen L. Boyd, Richard E. Boyd, Bobby D. Bradford, Otha Brewer, Richard W. Brock, James E. Brooks, Brenda K. Burright, Terry Lee Burright, Harry F. Butler, Jr., Paula J. Cameron, Arthur E. Carter, Joni R. Childress, Helven D. Christian, Delores J. Cobb, Ronald Dean Cole, Paul M. Crabtree, Norma Jean Creech, Cramalia P. Cross, Loren L. Cross, Carey L. Daily, Katherine M. Daily, Antoinette Davis, Randal K. Davis, Loyd W. DeShazo, Roscoe E. Elliott, Deborah Jo Ellison, William L. Engle, Estate of Jesse Holshouser, George Evans, Shirley A. Evans, Billy L. Farrow, Gregory Fillmore, Brenda Ann Fountain, Steve Foust, Ricky W. Fowler, Daniel R. Fritts, Carol M. Gauntt, Justin Gipson, Michelle Gitthens, Lafayette Glover, Sr., Mary Ann Godosky, Frank O. Goldsmith, Dale K. Graham, Harrison Grayson, Fredie L. Green, Lyna E. Green, Randell Green, Harold E. Griffey, Jr., Larence H. Grove, Jr., Robert Guthrie, Claude R. Hales, John Halstead, David Lee Hardin, Charles P. Harding, Robert G. Harris, Raymond Heinken, Beverly Henning, Loretta J. Herndon, Bobby R. Hill, Donald G. Hodge, Jr., Royce S. Hodges, Linda S. Holt, James Humphries, Randall Ingman, James Jacobs, Ivory S. James, Joan V. Jameson, Rosa L. Jennings, Roley Johnson, Jr., David E. Jones, Ronald E. Kelley, Larry D. Ketcham, Joe A. Knost, Buddy M. Kuhlman, Gary R. Larrison, David C. Lindley, Clarence E. Long, Mikey R. McClendon, Sr., Merlin McGary, Ralph Marlin, Carl A. Maskell, Richard E. Michael, Ricky D. Montgomery, Claudetta Moore, Johnnie L. Moore, Tony R. Moore, Lugene Morris, John G. Nicholas, III, Larry R.

Nickell, Mary J. Nixon, Floyd D. Dennis Osborn, Norbert A. Ottke, Kenneth O. Owen, Roger Oxford, Janette D. Palmour, Earl D. Parker, Donald L. Patterson, Allen D. Peery, Jesse D. Plunkett, Jr. (Sarah), Ricky E. Redman, Ernest E. Ridley, Jr., (Flossie), Douglas P. Riemer, Judy A. Rowland, LaWanda Schane, Larry G. Schmidt, Ronald K. Schornick, Evelyn Schuessler, Louise Schuggs, Marilyn Ann Sebek, Rob Sonnier, John A. Stalford, Paul Stein, Terry D. Stevenson, Richard S. Stoltz, Johnny Stoops, Larry Strickland, Rosetta M. Stroud, Mike Sullivan, Michael Sumpter, Herman Sutton, Jr., Brenda Joyce Swindoll, Delbert L. Taylor, Richard B. Thielen, William P. Thomas, Gaylon D. Thompson, George P. Thompson, Larry Thompson, Martin B. Thompson, Marvin L. Toolate, Yvonne J.J. Traylor, Roy L. Varner, Kenneth L. Vickers, Forrest N. Walker, Margaret G. Ward, Mary Warren, Clifford Warrior, Harrell W. Weaver, Carl James Wilder, Franklin D. Williams, M. C. Wilson, Jr., Cleveland Wimbley, Paul L. Wolf, Claude Woody, Jr., Don A. York, and Sharon J. York.

II.

The Plaintiffs in this case (including those who have intervened) are residents of the State of Oklahoma and are as follows:

James Akin, Richard Arellano, Charles Baldwin, Annie M. Barnes, Marcia Brannock, Delton Brown, Gary Burwell, Timothy Caraway, Thomas W. Clark, David Clausen, Richard Cotey, Connie Cottrell, Ronnie Cottrell, Steven L. Coy, Hugh Crow, Nathan D'Amico, Eddie R. Danna, Jr., Donna M. Davis, Leandra DeMoss, Orville

DeShields, Louis R. Dickinson, Ollie Dillishaw, Jr., Danny Driskill, Eddie Duck, Jr., Danny Dunn, Jenny L. Duren, Bill R. Durington, Doris Brown Durlin, Stephen Ray Duty, Leon Ealon, Larry Elliott, Debra Emerich, Janette Farley, Lloyd Freed, Jon G. Gabbard, Debra Hall Gabbard, Linda D. Gatewood, Lance Gilley, Max R. Glover, Wendell Glover, James Goff, Wendell Gomez, John C. Gould, Phyllis J. Gould, Regina Grissam, Kenneth O. Hart, Michael Hawkins, Edgar Houston, Gerald Houston, Valencia Howell, Ralph V. Ice, Ray Irvan, Eric L. Janousek, David Keiser, Billy B. King, Larry D. Liddell, David Love, Robert C. Love, Jimmy Lynch, Thomas Marshall, James McLane, Michael D. Mowles, Jeffrey Murray, Melvin E. Norton, Zenephor Overstreet, James M. Owen, Terry W. Oxley, Ronald K. Peoples, Michael Phillips, Louise Pickard, Marie L. Plumlee, Phillip Plumlee, Rick Reames, Sarah Reese, Jack D. Rhoden, Otha Rhoden, Wayne Richardson, Dorothy Rimbold, Tijuana Robinson, Aline Rockwell, Charlon S. Rogers, Sandra Rolland, Marlys Rone, Tony E. Ruble, Mary Sayre, Reatha R. Schlegel, Gloria Shelton as Representative of the Estate of Wilton F. Shelton, deceased, Charlie Sheppard, Herman D. Sikes, Terry Simpson, William D. Slattery, Larry Smith, Kenneth Snyder, Jess Stanley, Clayton D. Stastny, Melissa C. Stastny, Gayla S. Staton, Paul Stein, Martha J. Storozyszyn, Rick L. Stuart, James Sykes, Emmett Thomas, Jr., Benjamin Tingle, Marilyn J. Tracey, Gary Vessell, Helen Walker, William Ward, Noreen Welch, George West, Randy F. Wiens, Leonard Williams, Morten D. Williams, Linda Willis, Glenda Wright, Herman Dale Wright, Kenneth L. Wright, Albert A. Wyatt, James D. Wyatt, Johnnie R. York, Lois Ayers, Terry Bruner, Floyd

Burelson, Christy Cannon, Mark Chisholm, Billie Cochran, Delores Coley, Virgil W. Clark, James Croom, Mary Dodson, Saundra Duncan, Jimmy Easton, Donald Flatt, James Henderson, David Higgins, Cathy Kaler, Debra Kellogg, Russell Kinney, Phyllis Knott, Landy Lancaster, Jerry Lum, Jack McSwain, James Messick, Daniel Moody, Jack Oblander, Patricia Orr, David Parris, Helen Payne, Virginia Perry, Winfred Plunkett, Debra Sanders, Thomas Sanders, Orin Shaw, Zeffie Swanegan, George Thorpe, Lonnie Trammell, Peggy Walton, Clinton Wilburn, Daniel Williams, Richard Williams, Barbara Yott, Debra Coy, David De Selms, William Dunlap, Marilyn Gaitlyn, Jimmy Gatewood, Frances Hinds, Laveda Montague, Fred Stockton, Ronald Williams and Rosetta Williams.

The Defendants as listed below, are foreign corporations as cited for each Defendant. This case had previously been removed to the United States District Court for the Western District of Oklahoma with jurisdiction based on diversity of citizenship.

III.

Defendant, Chemical Specialists & Development Inc. is a Texas Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, E. I. DuPont de Nemours Company, Inc. is a Delaware Corporation and has previously been served and is before this court for all purposes. A copy of

this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, General Electric Company is a New York Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, GTE Products Corp. is a Massachusetts Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Haynes International, Inc. is a Delaware Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, J. W. Harris Co., Inc. is an Ohio Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Metallurgical Technologies Inc. is a Texas Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Pratt & Whitney Company Inc. is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all

purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Thunderbird Sales Company is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Union Carbide Chemicals & Plastics Company, Inc. is a New York Corporation and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, United Technologies Corporation is a foreign corporation doing business in the State of Texas and has previously been served and is before this court for all purposes. A copy of this instrument will be served on their attorney of record, by certified mail, return receipt requested.

Defendant, Ashland Chemical is an Ohio corporation and may be served with process through their agent for service, The Corporation Trust Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Ashland Oil is a Kentucky corporation and may be served with process through their agent for service, The Corporation Company, 735 First National

Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Kerr-McGee Chemical Co. is a Delaware corporation and may be served with process through their agent for service, Russell G. Horner, Jr., 123 Robert S. Kerr, Oklahoma City, Oklahoma 73125, by certified mail, return receipt requested.

Defendant, Shell Oil Company is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Spray-On Systems, Inc. is an Ohio corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Sherwin-Williams is an Ohio corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Magnaflux Corporation is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, McGean-Rohco, Inc., formerly known as McGean Chemical Company, Inc. is an Ohio corporation and may be served with process through their agent for

service, John D. Drinko, 1900 East 9th St., Suite 3200, Cleveland, Ohio 44114, by certified mail, return receipt requested.

Defendant, Cee Bee Chemical, a Division of McGean-Rohco, Inc. is an Ohio corporation and may be served with process through their agent for service, Willie R. Smith, 9520 Cee Bee Drive, Downey, California 90241, by certified mail, return receipt requested.

Defendant, Cee Bee Chemicals, Inc., is an Ohio corporation and may be served with process through their agent for service, Kerry H. May, 50 Public Square, Suite #1250, Cleveland, Ohio 44113 by certified mail, return receipt requested.

Defendant, Met-L-Chek Company is a California corporation and may be served with process through their agent for service, William E. Mooz, 1639 Euclid Street, Santa Monica, California 90404, by certified mail, return receipt requested.

Defendant, Octagon Process, Inc. is a New Jersey corporation and may be served with process through their agent for service, Morrill J. Cole, 25 Main Street, Hackensack, New Jersey 07602, by certified mail, return receipt requested.

Defendant, Plaze, Inc. is a Missouri corporation and may be served at their corporate address, 9401 Watson Industrial Park, St. Louis, Missouri 63126, Attention: Hugh Davidson, Vice President of Sales, pursuant to Fed. R. Civ. P. Rule 4(d).

Defendant, Royal Lubricants Company, Inc. is a Delaware corporation and may be served with process

through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Solvents & Chemicals, Inc. is a Texas corporation and may be served with process through their agent for service, M.B. Merrill, 5433 Westheimer, Suite 700, Houston, Texas 77756, by certified mail, return receipt requested.

Defendant, Stecco, Inc. is a Delaware corporation and may be served with process through their agent for service, Corporation Service Company, 1013 Center Road, Wilmington, Delaware 19805, by certified mail, return receipt requested.

Defendant, Tapmatic Corporation is a California corporation and may be served with process through their agent for service, Maxine White, 802 Clearwater Loop, Post Falls, Idaho 83854, by certified mail, return receipt requested.

Defendant, Thompson & Formby, Inc. is a Florida corporation and may be served with process through their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324, by certified mail, return receipt requested.

Defendant, L&F Products, Inc. is a Delaware corporation and may be served with process through their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324, by certified mail, return receipt requested.

Defendant, Minwax Company, Inc. is a New Jersey corporation and may be served with process through

their agent for service, C.T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324.

Defendant, Truflex Rubber Products Company is a California corporation and may be served at their corporate address, 1667 North Main Street, Los Angeles, California 90012 by certified mail, return requested.

Defendant, Break-Free, Inc. is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Defendant, Loctite Corporation is a Delaware corporation and may be served with process through their agent for service The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Defendant, Southwest Petro-Chem, Inc. is a Delaware corporation and may be served with process through their agent for service The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, W.M. Barr & Co., Inc. is a Tennessee corporation and may be served with process through their agent for service, Bruce F. Doane, 2105 Channell, Memphis, Tennessee 38113, by certified mail, return receipt requested.

Defendant, The Dow Chemical Company is a Delaware corporation and may be served with process

through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Dow Industrial Service of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service. The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Dow Division of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102 by certified mail, return receipt requested.

Defendant, Brazos Oil & Gas of The Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, 3M Company is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Minnesota Mining and Manufacturing Company is a Delaware corporation and may be served

with process through their agent for service The Corporation Trust Company, 1209 Orange St., Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Monsanto Company is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Mallinckrodt Group, Inc., formerly known as Imcera Group, Inc. is a Delaware corporation and may be served with process through their agent for service The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Diamond Shamrock Corp. is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 1209 Orange St., Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Diamond Shamrock Corp. a/k/a Cocidental Electrochemicals, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Amco Chemical Corp. is a Texas corporation and may be served with process through their agent for service, J. Melton McCrary, 6123 England, Houston, Texas 77021 by certified mail, return receipt requested.

Defendant, Solvent Chemical Co., Inc. is a Delaware corporation and may be served with process through their agent for service, Dummy Agent Account, Secretary of State, Townesend Building, Dover, Delaware 19901, by certified mail, return receipt requested.

Defendant, Fisher Chemical is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 32 Loockerman Square, Suite L100, Dover, Delaware 19904 by certified mail, return receipt requested.

Defendant, Allied Corporation is a New York corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Alliedsingal, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 725 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Norton Company is a Massachusetts corporation and may be served with process through their agent for service, C.T. Corporation Systems, 2 Oliver Street, Boston, Massachusetts 02019, by certified mail, return receipt requested.

Defendant, Exxon Corporation is a New Jersey corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Exxon Chemical is a New Jersey corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, CSD, Inc., is an Oklahoma corporation and may be served with process through their agent for service, Benjamin J. Curtis, 900 Broadway, Suite #3, Poteau, Oklahoma 74953, by certified mail, return receipt requested.

Defendant, Chem-Tronics, Inc., is a California corporation and may be served with process through their agent for service, The Prentice Hall Corporation Systems, Inc., 115 S.W. 89th Street, Oklahoma City, Oklahoma 73139.

Defendant, Federal-Mogul Corporation is a Michigan corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Mobil Oil Corporation is a New York corporation and may be served with process through their agent for service, The Prentice Hall Corporation Systems, Inc., 115 S.W. 89th Street, Oklahoma City, Oklahoma 73139, by certified mail, return receipt requested.

Defendant, Ameron, Inc., is a California corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102 by certified mail, return receipt requested.

Defendant, Safety-Kleen Corporation is a Wisconsin corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 115 S.W. 89th Street, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Blazer East, Inc., formerly known as Koppers Company, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

Defendant, Saran Protective Coatings Co. is a Michigan corporation and may be served with process through their agent for service, Noel Smith, 17332 Shields, Detroit, Michigan 48212, by certified mail, return receipt requested.

Defendant, Seymour of Sycamore, Inc., is an Illinois corporation and may be served with process through their agent for service, S.M. Heatley, 917 Crosby Avenue, Sycamore, Illinois 60178 by certified mail, return receipt requested.

Defendant, Amjay Corporation is a Texas corporation and may be served with process through their agent for service, G.V. Kshatriya, 11490 Westheimer, Suite 290, Houston, Texas 77077 by certified mail, return receipt requested.

Defendant, Dexter Corp. is a Delaware corporation and may be served with process through their agent for service, The Company Corporation, 3 Christina Center,

201 N. Walnut Street, Wilmington, Delaware 19805, by certified mail, return receipt requested.

Defendant, Uni-Kem International, Inc., is a Louisiana corporation and may be served with process through their agent for service, J. Inchauspegui, 513 Hickory Ave., Harahan, Louisiana 70123 by certified mail, return receipt requested.

Defendant, Miller-Stephenson Chemical Company, Inc., formerly known as Miller-Stephenson Company of Conn., Inc., is a Connecticut corporation and may be served with process through their agent for service, George M. Stephenson, George Washington Highway, Danbury, Connecticut 06810, by certified mail, return receipt requested.

Defendant, Bel-Ray Company, Inc. is a New Jersey corporation and may be served with process through their agent for service, Daryl Brosnan, Bowman Ave., P.O. Box 526, Farmingdale, New Jersey 07727, by certified mail, return receipt requested.

Defendant, Pacific Grinding Wheel, Inc. is a New Jersey corporation and may be served with process through their agent for service, Donald L. Tischer, 13120 Highway 99, Marysville, Washington 98270, by certified mail, return receipt requested.

Defendant, Speedcut, Inc., is an Illinois corporation and may be served with process through their agent for service, Martha R. Roper, 2500 Latham Street, Rockford, Illinois 61103 by certified mail, return receipt requested.

Defendant, Crawford Laboratories, Inc., is an Illinois corporation and may be served with process through

their agent for service, Benjamin Shmetterer, 4165 S. Emerald, Chicago, Illinois 60609, by certified mail, return receipt requested.

Defendant, Sherwin, Incorporated is a California corporation and may be served with process at their corporate address, A.G. Sherwin, 5530 Borwick Avenue, South Gate, California 90280 by certified mail, return receipt requested.

Defendant, Cabot Corporation is a Delaware corporation and may be served with process through their agent for service, The Prentice Hall Corporation System, Inc., 115 S.W. 89th, Oklahoma City, Oklahoma 73139, by certified mail, return receipt requested.

Defendant, Brent America, Inc., formerly Brent Chemicals Corporation is a Delaware Corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Chemical Commodities Agency is a California corporation and may be served at their corporate address, 27447 Pacific Street, Highland, California 92346, Attention: Richard Simon, by certified mail, return requested.

Defendant, Packaging Service Co., Inc., is a Texas corporation and may be served with process through their agent for service, Gabriel J. Baizan, 929 S. Shaver, Pasadena, Texas by certified mail, return receipt requested.

Defendant, Penetone Corporation, formerly known as W.C.P. Industries, Inc., is a New Jersey corporation and may be served with process through their agent for service, Prentice-Hall Corporation Systems/NJ, 830 Bear Tavern Road, West Trenton, New Jersey, by certified mail, return receipt requested.

Defendant, Continental Chemical Co., Inc. is a Delaware corporation and may be served with process through their agent for service, Prentice Hall Corporation Systems, inc., 32 Loockerman Square, Suite L-100, Dover, Delaware 19904, by certified mail, return receipt requested.

Defendant, Borden, Inc., formerly known as The Borden Company, is a New Jersey corporation and may be served with process through their agent for service, Edwin K. Large, Jr., 117 Main St., Flemington, NJ 08822, by certified mail, return receipt requested.

Defendant, ITW Fluid Products Group, a Division of Illinois Tool Works, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Illinois Tool Works, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Pratt & Lambert United, Inc., formerly Pratt & Lambert, Inc., is a New York corporation and may

be served with process at their corporate office, 73-97 Tonawanda Street, Buffalo, New York 14207 by certified mail, return receipt requested.

Defendant, Beecham HIP, Inc., formerly Beecham Home Improvement Products, formerly Beecham Home Improvement Products, Inc., formerly Remwell, Inc., is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Polymeric Systems, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801, by certified mail, return receipt requested.

Defendant, Desoto, Inc. is a Delaware corporation and may be served with process through their agent for service, The Corporation Trust Co., 1209 Orange Street, Wilmington, Delaware 19801 by certified mail, return receipt requested.

Defendant, Phipps Products, a Division of Dow Chemical Company is a Delaware corporation and may be served with process through their agent for service, The Corporation Company, 735 First National Building, Oklahoma City, Oklahoma 73102, by certified mail, return receipt requested.

IV.

Plaintiffs bring this action because of the personal injuries and damages of Plaintiffs herein for toxic

chemical, solvent, mineral and metal exposure. Plaintiffs would show that all Plaintiffs were exposed to these chemicals, solvents, minerals and metals while working at Tinker Air Force Base in Oklahoma City, Oklahoma. Plaintiffs would show that said chemicals, solvents, minerals and metals were manufactured or provided by one or more of the named Defendants. (The chemicals, solvents, minerals and metals include but are not limited to cobalt, cadmium, chromium, Freon TF solvent, Freon PCA, RTV 108, RTV 106, Copper, Iron, Lanthanum, Manganese, Molybdenum, Nickel, Silicon, Vanadium, Tungsten, Zirconium, Yttrium, Aluminum, Titanium, Boron, Columbium, Tantalum, Silver, Zinc, Tin, PWA1317, PWA1306, PWA1307 D, Carbon, Trichloromethane, ADH powder, Grizeldalloy-0001, AMS 4782, Haynes 188, 1,2,2-Trifluouroethane, 1,1,2-Trichloethane, (Freon 113), 113 Trichlorotrifluoroethane, Methyl Chloroform, Dichlorodifluoromethane, Methylene Chloride, Methyl Ethyl Ketone, Methyl Ethyl Ketone, (2-Butanone), Xylene, Xylene (O-,M,-P-Isomers), Ethyl Benzene, Toluene, Methyl N-Propyl Ketone, Methyl Isobutyl Ketone, Dichloromethane, 1,1,1-Trichloroethane, 1-1-1 Trichloroethane, Freon TF, Trichlorotrifluoroethane, Cyclohexane, Methyl N-Amyl Ketone, Dichloromethane, Technical, Orthdichlorobenzene, Dry Cleaning Solvent, Trichloroethylene, Tetrachloroetheylene, Toluene MIBK, Toluene Tech, 1,1,1-Trichloroethan, Perchloroethylene, MEK Peroxide, Monochlordifluoromethane, Monochlordifluoromethane, Dichlorotetrafluoromethane, Trichloromonofloromethane, Trichlorotrifluoromethane, Toluene ACS, Monochlorotrifluoromethane, Bromochlorodifluoromethane, Chlorodifluoromethane, Trichloromonofluoromethane, asbestos,

silica, and Tetrachloroethylene, and Freon with additives). Plaintiffs would further show that General Electric Company, Pratt & Whitney Company Inc., and United Technologies Corporation provided jet engines to Tinker Air Force Base which were worked on, grinded on, reworked and repaired by the above-referenced Plaintiffs. The engines involved include but are not limited to J57, J79, TF30, TF33, TF41, F101, F108, F110 and all derivatives and models of those engines (For example – P5, P7, P11, P100, etc.). Each Plaintiff listed above was exposed to these chemicals, solvents, minerals and metals, and their fumes while working on these jet engines and jet engine parts in the course and scope of their employment at Tinker Air Force Base. These Plaintiffs worked on the jet engines by cleaning, grinding, reworking, and being generally exposed to the chemicals, solvents, minerals and metals while performing their work. The jet engine manufacturers also required, recommended and/or suggested certain of these hazardous chemicals, solvents, minerals and metals to be used in the cleaning, grinding and reworking of their engines.

V.

Plaintiffs would show that each of the above-referenced Plaintiffs are or have been employed at Tinker Air Force Base and were exposed to significant amounts of chemicals, solvents, minerals and metals. Plaintiffs were exposed to the chemicals, solvents, minerals, and metals without any warning of the true danger and hazards of them or their potential for causing adverse health effects.

Plaintiffs would show that such chemicals, solvents, minerals and metals, were designed, formulated, manufactured and distributed by the above-named Defendants; and they violated the terms and provisions of Section 402a and 402b of the Restatement of Torts (2nd). Plaintiffs allege defective manufacturing, design and marketing. These Defendants are strictly liable for these defective products which were the producing, proximate, and/or contributing cause of these Plaintiffs' injuries.

VI.

Plaintiffs would show that these Defendants were negligent and grossly negligent in one or more of the particulars with regard to warnings:

(1) In providing no warnings regarding the defective nature of the solvents and chemicals, or alternatively, providing inadequate warnings to the ultimate users, these Plaintiffs.

(2) In failing to take reasonable measures to ensure that appropriate warnings were given to individuals at Tinker Air Force Base so that the ultimate users, these Plaintiffs, would be aware of the dangers and hazards related to the use of these chemicals, solvents and metals.

All of the above were a proximate or producing cause of Plaintiffs' injuries and damages.

VII.

Plaintiffs would also show that the chemicals, solvents, minerals, defective protective gear, and metals sold and distributed by these Defendants were defectively

marketed and that such defective marketing was a proximate, producing and/or contributing cause of Plaintiffs' damages. Specifically, there was an inherent risk of harm that could be reasonably anticipated from the use of these products while cleaning, reworking and grinding on jet engine parts. In fact, the jet engine manufacturers required, recommended and/or suggested certain of these products to be used without any warning concerning the dangers and hazards of these products on their jet engines when they knew or should have known the risk of harm to these Plaintiffs. In addition, the jet engine manufacturers had their own employees on the premises of Tinker Air Force Base that were in a position to know about the dangers of using these hazardous chemicals, solvents, minerals, defective protective gear, and metals, as well as the dangerous levels of heavy metal dust created from the work performed on these engines, and yet these Defendants still failed to warn these Plaintiffs or anyone at Tinker Air Force Base concerning the health hazards related to the use of these chemicals, solvents, minerals, defective protective gear and metals. The absence of warnings or inadequate warnings was a producing, proximate, and/or contributing cause of these Plaintiffs' injuries and damages. Plaintiffs also would show that these chemicals, solvents, minerals, defective protective gear, and metals were defectively manufactured and designed and such were made unreasonably dangerous to these Plaintiffs. Plaintiffs would also show that their employer, the United States Government, did not specify a particular design to these defendants that was peculiar to the United States Government, but

designs that were also sold and distributed commercially by these Defendants as well.

VIII.

The Plaintiffs would also show that these Defendants were negligent and grossly negligent in the manufacture, design, marketing, sale and distribution of these jet engines, chemicals, solvents, defective protective gear, and minerals. The additional acts and omissions of all of these Defendants, which make them liable to these Plaintiffs for negligence and gross negligence are as follows:

(1) In failing to warn these plaintiffs of the health hazards in using these chemicals, solvents, minerals, defective protective gear, and the metal dust created when working on these engines and the use of the chemicals, solvents and minerals on the jet engines.

(2) In failing to warn the employer of these Plaintiffs as to the health hazards of these chemicals, solvents, minerals and the metal dust created when working on these engines.

(3) In failing to properly test these chemicals, solvents and minerals to determine the dangerousness of them.

(4) In failing to give proper instruction with regard to the use of these chemicals, solvents, defective protective gear, and minerals so that they could be used safely, if at all.

(5) In failing to determine the exact use and application of these chemicals, solvents and minerals so that additional warnings and instructions

could be issued to either the employer or the Plaintiffs themselves.

(6) In failing to conduct proper industrial hygiene studies to determine the dangerousness and toxicity to humans with regard to these chemicals, solvents and minerals and from the metal dust created from working on these jet engines.

(7) In selling these chemicals, solvents, minerals and engines when they knew or should have known of the dangers regarding the use of solvents, chemicals, and minerals on the jet engines and in general use.

(8) In selling these solvents, chemicals, minerals and engines without requiring warnings to be made to these plaintiffs about health hazards regarding the use of them singularly or together.

(9) In representing that these chemicals, solvents, defective protective gear, and minerals were safe for use in the application in which they were made.

(10) In not representing all dangers related to these chemicals, solvents and minerals on the MSDS sheets, which is a violation of law.

(11) In failing to insure that the Plaintiffs and Plaintiffs' employers were properly and adequately warned regarding the use of these chemicals, solvents, defective protective gear, and minerals in general or on these jet engines.

(12) In providing these chemicals, solvents, defective protective gear, and minerals when these Defendants knew or should have known that they were inherently unsafe for their intended use.

(13) In failing to test these chemicals, solvents and minerals with regard to bio-compatibility.

(14) In failing to test these chemicals, solvents and minerals for tissue reactions, neurological effects, respiratory effects and any other negative health effects.

(15) In failing to take reasonable measures to prevent the improper use of these chemicals, solvents and minerals or the use of them in an unsafe manner on these jet engines or in general.

(16) In maintaining a corporate policy of silence and disassociation concerning the known dangers of these chemicals, solvents and minerals and the heavy metal dust created from working on these jet engines.

(17) In allowing the ultimate users to believe that these chemicals, solvents and minerals were safe when they knew they were not.

(18) In not performing radiation tests or studies to determine the radiation exposure to these plaintiffs in working on these jet engines when grinding and/or reworking or with a combination of the chemicals, solvents, and minerals.

(19) In allowing the Plaintiffs to be exposed to dangerous levels of radiation.

(20) In failing to warn of health effects from radiation exposure to these jet engines while these Plaintiffs worked on them.

(21) In failing to warn of the synergistic effect of the chemicals, solvents, and minerals with the heavy metal dust, or with each other.

(22) In failing to warn of the proper protective gear to wear when working with the chemicals, solvents, minerals, and metals.

(23) In providing defective or inadequate protective gear in order to protect against the dangers of these chemicals, solvents, minerals, and metals.

(24) In failing to inform these Plaintiffs of the dangerous levels of heavy metal dust created when working on these jet engines.

All of these acts and/or omissions, either singularly or in combination, were the proximate, producing, and/or contributory cause of these Plaintiffs' injuries and damages.

IX.

The jet engine manufacturers were also negligent and grossly negligent in recommending, suggesting, or requiring certain of these chemicals, solvents, protective gear, and minerals to be used on their jet engines or parts when they knew or should have known that they were dangerous without giving proper warnings. These jet engine manufacturers were also negligent and grossly negligent in failing to warn of the danger involved in grinding and reworking on their engines, and the dangers associated with the heavy metal dust created and the danger of using certain solvents, chemicals and minerals used to clean or work on them.

X.

The jet engine manufacturers were also negligent and grossly negligent through their employees who were on

the premises of Tinker Air Force Base in failing to warn these Plaintiffs about the dangers of the heavy metal dust created from their reworking and grinding operations, as well as the use of these dangerous chemicals, solvents and minerals that were required by these jet engine manufacturers in the cleaning, x-ray, grinding and reworking process of these jet engines and jet engine parts. These Plaintiffs also plead that the jet engine manufacturers had a right of control of these Plaintiffs, and breached the duty to properly protect and insure their safety since these manufacturers had expertise, knowledge and location on the premises at Tinker Air Force Base, and yet failed to warn and/or protect these plaintiffs. These negligent and grossly negligent acts were a producing, proximate, and/or contributing cause of the Plaintiffs' injuries and damages.

XI.

Plaintiffs would also show that these Defendants were negligent per se in that they violated various federal regulations concerning the labeling and/or publication of MSDS sheets which did not include full disclosure concerning the dangerousness of these chemicals, solvents and minerals and the use of these chemicals, solvents and minerals on these jet engines. Plaintiffs would show that they were in the group of persons who were intended to be protected by these statutes and regulations. The violations of these statutes, either singularly or collectively, constitute negligence per se. The Defendants' violations of these statutes and regulations were a proximate and/or producing cause of Plaintiffs' injuries. Plaintiffs would

also show that these Defendants were negligent and violated the provisions of the Restatement 2nd of Torts Section 388 in supplying chemicals, solvents, defective protective gear, minerals and in selling jet engines and requiring, recommending, or suggesting certain dangerous chemicals, solvents and minerals to be used on these jet engines when these Defendants knew or had reason to know that the use of these chemicals, solvents, defective protective gear, and minerals were dangerous for the use for which they were being supplied and when they had no reason to believe that these Plaintiffs would realize the dangerous conditions of these chemicals, solvents, defective protective gear and minerals or the dangerous of the heavy metal dust emitted during the grinding and reworking operations or in the use of these chemicals, solvents and minerals on these jet engines.

XII.

These Plaintiffs would also show that these Defendants impliedly warranted that their products, whether they be jet engines, protective equipment, chemicals, solvents, and minerals were reasonably fit for the ordinary purposes for which they were intended to be used and would pass without objection in the trade or under its description. However, this warranty was breached since these products were not fit for the ordinary purposes for which they were intended to be used. This breach of implied warranty caused severe health problems for these Plaintiffs. These Defendants knew that their products were not merchantable when they were sold to Tinker Air Force Base and the various distributors in which they used for the distribution for their products. Defendants

are also liable for breach of express warranties. These Defendants expressly warranted that their products were safe for use in jet engine repair, cleaning and re-working. These Plaintiffs would show that the breach of implied and express warranties were the proximate cause, if not the sole cause, of these Plaintiffs' injuries and damages. Plaintiffs would further show that these Defendants violated Section 2,313, 2.314 and 2.315 of the Uniform Commercial Code since these products manufactured, sold and distributed by these Defendants were not of the quality, grade or description that these Defendants represented. All of these breach of warranties and misrepresentations were the proximate, producing, and/or contributing cause of these Plaintiffs' injuries and damages.

XIII.

Plaintiffs also plead violations of the provisions of the Oklahoma Deceptive Trade Practices Act, including, but not limited to, Section 53a(1-11), b and c, Section 54a, b, c and d. Plaintiffs would show that the deceptive acts by all of these Defendants were the proximate, producing, and/or contributing cause of these Plaintiffs' injuries and damages. Plaintiffs would also show that these deceptive acts were committed knowingly, and these Plaintiffs are entitled to exemplary damages for these knowing acts.

XIV.

These Plaintiffs would also show that one or more of these Defendants engaged in fraud and/or fraudulent

concealment concerning safety information, which by federal regulation should have been contained in the material safety data sheets (MSDS) and in concealing the true dangers of these chemicals, solvents, defective protective gear, minerals and heavy metal dust created from these jet engines. These fraudulent acts were a producing, proximate, and/or contributing cause of these Plaintiffs injuries and damages.

XV.

Plaintiffs would show that the grinding, reworking and use of solvents on these jet engines generally were and are ultra-hazardous activities and these Defendants should be strictly liable to these Plaintiffs for these injuries and damages pursuant to the Restatement of Torts (2d).

XVI.

The Plaintiffs would show that their exposures to these chemicals, solvents, minerals, defective protective gear, and metals have existed for many years and have continued up until the present creating new injuries on almost a daily basis.

XVII.

The injuries and damages caused by the acts of these Defendants as stated above, caused these Plaintiffs irreversible brain damage, upper respiratory disease, dermitis, bronchitis, emotional problems, heart disease,

central nervous system disorders, and various other medical problems.

Plaintiffs would further plead a cause of action for fear of an increased risk of brain disorders, cancer, and other diseases as a result of the exposure to the above-referenced chemicals, solvents, minerals and metals.

XVIII.

Plaintiffs further sue all Defendants for the physical pain and suffering, disfigurement, and impairment that these Plaintiffs have suffered as a result of these injuries. Additionally, Plaintiffs sue for recovery of damages herein for physical pain and suffering, disfigurement, and impairment which they will endure for the remainder of their lives.

XIX.

Plaintiffs further sue all Defendants for reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question. Additionally, Plaintiffs further sue for reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future and for reasonable medical and hospital expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

XX.

Plaintiffs further sue all Defendants for loss of earnings which Plaintiffs have sustained up until the time of trial. Additionally, Plaintiffs further sue for the loss of reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future.

XXI.

Plaintiffs would show that they sustained mental anguish of an almost incalculable nature including the obvious mental anguish which necessarily accompanies any type of brain disorder, and fear of contracting brain disorders, cancer or fear of contracting cancer and other diseases as a result of their exposure to the above-referenced products. Plaintiffs also sue all Defendants for the mental anguish they will suffer for the remainder of their lives. Accordingly, Plaintiffs sue for a sum of money which will reasonably compensate Plaintiffs for their damages resulting from the occurrence in question as follows:

1) Physical pain which the Plaintiffs have suffered up until the time of trial;

2) Mental anguish which the Plaintiffs have suffered up until the time of trial;

3) Reasonable expenses for necessary medical and hospital care received by Plaintiffs in the past for treatment of their injuries resulting from the occurrence in question;

4) Loss of earnings which Plaintiffs have sustained up until the time of trial;

5) Physical impairment which Plaintiffs have suffered up until the time of trial;

6) Disfigurement which Plaintiffs have suffered up until the time of trial.

7) Loss of enjoyment of life.

8) Fear of cancer/brain disorders and increased risk of cancer/brain disorders.

XXII.

The Plaintiffs also sue for the following elements of damages which Plaintiffs will sustain in the future from the time of trial as a result of the exposures made the basis of this lawsuit.

1) Physical pain and suffering which Plaintiffs will, in reasonable probability, suffer in the future;

2) Mental anguish which Plaintiffs will, in reasonable probability, suffer in the future;

3) Reasonable expenses for necessary medical and hospital care which will, in reasonable medical probability, be required by Plaintiffs in the future;

4) The loss reduction in earning capacity which Plaintiffs will, in reasonable probability, suffer in the future;

5) The damages which result from the physical impairment which Plaintiffs will continue to suffer in the future and the inability to perform those tasks and services which they ordinarily would perform in the future;

6) The disfigurement which Plaintiffs will continue to suffer in the future.

7) The reasonable expenses for medical monitoring of all Plaintiffs for the remainder of the Plaintiffs' natural lives.

8) Loss of enjoyment of life.

9) Fear of cancer and increased risk of cancer.

XXIII.

The Plaintiffs will prove upon trial of this cause, they have sustained damages as a direct and proximate result of the negligence, gross negligence, violations of the applicable products liability laws, ultra hazardous activity, fraud, fraudulent concealment, negligence per se, and deceptive trade practices which were all a producing, proximate, and/or contributing cause or result of such damages and request that judgment be entered against all of these Defendants in the amount of Four Hundred Million Dollars ($400,000,000.00) in actual damages to these Plaintiffs.

XXIV.

Plaintiffs would show that Defendants were aware of the defects in their products. Therefore, this conscious decision to permit the products to be used by workers at Tinker Air Force Base without adequate warnings or precautions and in a defective condition constitutes a wanton, willful disregard for the rights of Plaintiffs which renders Defendants liable to Plaintiffs for exemplary damages. The amount of exemplary damages Plaintiffs plead for is Eight Hundred Fifty Million Dollars ($850,000,000.00)

XXV.

Plaintiffs further claim prejudgment and postjudgment interest at the maximum rate allowed by law and for attorney fees pursuant to the Oklahoma Deceptive Trade Practices Act.

XXVI.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein as the law directs, and that upon final hearing, Plaintiffs have and recover judgment of and from these Defendants, both jointly and severally, in the sum of Four Hundred Million Dollars ($400,000,000.00) in actual damages, Eight Hundred Fifty Million Dollars ($850,000,000.00) in exemplary damages, costs of court, prejudgment and post-judgment interest, and attorney fees which may by authorized by law, and for such other and further relief, both general and special, at law and in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

HOLLOWAY DOBSON HUDSON
BACHMAN ALDEN
JENNINGS ROBERTSON &
HOLLOWAY
One Leadership Square, Suite 900
211 N. Robinson
Oklahoma City, Oklahoma 73102
(405) 235-8593

By: /s/ Gary C. Bachman
GARY C. BACHMAN,
OBA #400

-and-

MITCHELL A. TOUPS
E. HART GREEN
WELLER, GREEN,
McGOWN & TOUPS
Fifth Floor Petroleum
Tower
550 Fannin Street
Beaumont, TX 77701

DENNIS REICH
ROBERT J. BINSTOCK
REICH & BINSTOCK
4265 San Felipe, Ste. 1000
Houston, TX 77027

ATTORNEYS FOR
PLAINTIFFS

CERTIFICATE OF MAILING

This is to certify that on this ___ day of _____, 1994, a true and correct copy of the above and foregoing document was mailed postage prepaid to:

Dennis Reich
Robert J. Binstock
Reich & Binstock
4265 San Felipe, Ste. 1000
Houston, TX 77027

ATTORNEYS FOR PLAINTIFFS

E. Hart Green
Mitchell A. Toups
Steven R. Thomas
Weller, Green, McGown & Toups
550 Fannin, Ste. 500
P O Box 350
Beaumont, TX 77704-0350

ATTORNEYS FOR PLAINTIFFS

Michael W. Hinkle
Gary D. Roper
Marina S. Valley
Hinkle, Roper & Valley
2720 Liberty Tower
100 N. Broadway
Oklahoma City, OK 73102

ATTORNEYS FOR CHEMICAL SPECIALISTS & DEVELOPMENT, INC. AND TAPMATIC CORPORATION

Gerald P. Green
Curtis L. Smith
Pierce, Couch, Hendrickson,
Baysinger & Green
P O Box 26350
Oklahoma City, OK 73126-0350

ATTORNEYS FOR SAFETY-KLEEN CORPORATION AND PRATT & LAMBERT

Michael J. Sweeney
James R. Miller
Dickie, McCamey & Chilcote
2 PPG Place, Ste. 400
Pittsburgh, PA 15222-5402

ATTORNEYS FOR PRATT & LAMBERT

Lana Cohlmia
Randal D. Homburg
Cohlmia, Homburg & Heath
50 Penn Place, Ste. 440
Oklahoma City, OK 73118

ATTORNEYS FOR TRU-FLEX/PANG RUBBER PRODUCTS CO. sic [TRU-FLEX RUBBER PRODUCTS CO.]

Walter D. Haskins
Martha J. Phillips
Atkinson, Haskins, Nellis, Boudreaux,
Holeman, Phipps & Brittingham
1500 ParkCentre
525 S. Main
Tulsa, OK 74103-4524

ATTORNEYS FOR OCTAGON PROCESS, INC.

David L. Thomas
Lyle S. Vaughn
Karen Eby
Haswell Hughey Vaughn & Thomas
100 N. Broadway, Ste. 1650
Oklahoma City, OK 73102

ATTORNEYS FOR ALLIEDSIGNAL INC. SUCCESSOR TO ALLIED CORPORATION; AMERON, INC.; ASHLAND CHEMICAL COMPANY, A DIVISION OF ASHLAND OIL, INC; BEAZER EAST, INC., sic (BLAZER EAST, INC.), F/K/A KOPPERS COMPANY, INC., THE DOW CHEMICAL COMPANY FOR ITSELF AND ITS FORMER SUBSIDIARIES AND/OR DIVISIONS DOW INDUSTRIAL SERVICES AND BRAZOS OIL & GAS; EXXON CORPORATION FOR ITSELF AND ITS UNINCORPORATED DIVISION EXXON CHEMICAL COMPANY; FISHER SCIENTIFIC COMPANY sic (FISHER CHEMICAL); MILLER-STEPHENSON CHEMICAL COMPANY, INC.; MINNESOTA MINING AND MANUFACTURING COMPANY D/B/A 3M COMPANY; MONSANTO COMPANY; ROYAL LUBRICANTS COMPANY, INC.; SHELL OIL COMPANY; THE SHERWIN-WILLIAMS COMPANY FOR ITSELF AND ITS FORMER DIVISION F/K/A SPRAYON DIVISION, SPRAYON PRODUCTS, INC., AND/OR SPRAYON, INC.; AND SOUTHWEST PETRO-CHEM, INC.

F. Walter Conrad, Jr.
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002

ATTORNEYS FOR ALLIEDSIGNAL INC. SUCCESSOR TO ALLIED CORPORATION; AMERON, INC.; ASHLAND CHEMICAL COMPANY, A DIVISION OF ASHLAND OIL, INC; BEAZER EAST, INC., sic (BLAZER EAST, INC.), F/K/A KOPPERS COMPANY, INC., THE DOW CHEMICAL COMPANY FOR ITSELF AND ITS FORMER SUBSIDIARIES AND/OR DIVISIONS DOW INDUSTRIAL SERVICES AND BRAZOS OIL & GAS; EXXON CORPORATION FOR ITSELF AND ITS UNINCORPORATED DIVISION EXXON CHEMICAL COMPANY; FISHER SCIENTIFIC COMPANY sic (FISHER CHEMICAL); MILLER-STEPHENSON CHEMICAL COMPANY, INC.; MINNESOTA MINING AND MANUFACTURING COMPANY D/B/A 3M COMPANY; MONSANTO COMPANY; ROYAL LUBRICANTS COMPANY, INC.; SHELL OIL COMPANY; THE SHERWIN-WILLIAMS COMPANY FOR ITSELF AND ITS FORMER DIVISION F/K/A SPRAYON DIVISION, SPRAYON PRODUCTS, INC., AND/OR SPRAYON, INC.; AND SOUTHWEST PETRO-CHEM, INC.

Stephen P. Friot
Mark R. McPhail
Spradling, Alpern, Friot & Gum
101 Park Avenue, Ste. 700
Oklahoma City, OK 73102-7283

ATTORNEYS FOR DEFENDANT AND THIRD-PARTY PLAINTIFF, UNITED TECHNOLOGIES CORPORATION (Pratt & Whitney)

Andrew M. Coats
Richard C. Ford
Anton J. Rupert
Crowe & Dunlevy
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, OK 73102

ATTORNEYS FOR E.I. du PONT de NEMOURS AND COMPANY, UNION CARBIDE CHEMICALS AND PLASTIC COMPANY, INC., KERR MC-GEE CHEMICAL COMPANY, BEECHAM HIP, INC., FORMERLY BEECHAM HOME IMPROVEMENT PRODUCTS, FORMERLY BEECHAM HOME IMPROVEMENT PRODUCTS, INC., FORMERLY REMWELL, INC.; BORDEN, INC., FORMERLY THE BORDEN COMPANY

Robert P. Costello
McKenzie, Moffett, Elias & Books
Two Leadership Sq., Ste. 1300
211 N. Robinson
Oklahoma City, OK 73102-7114

ATTORNEYS FOR CABOT CORPORATION

Fred C. Begy, III
Adler Kaplan & Beggy
1 First National Plaza
51st Floor
Chicago, ILL 60603

ATTORNEYS FOR MAGNAFLUX, ITW FLUID PRODUCTS GROUP AND ILLINOIS TOOL WORKS

Kent Fleming
Huckaby, Fleming, Frailey, Chaffin,
Cordell, Greenwood, & Perryman
1215 Classen Drive
P O Box 60130
Oklahoma City, OK 73146

ATTORNEYS FOR DIAMOND SHAMROCK CORP., and DIAMOND SHAMROCK A/K/A OCCIDENTAL ELECTRO-CHEMICALS, INC.

Earl R. Donaldson
Law Offices of Earl R. Donaldson
3525 N.W. 56th Street, Ste B-160
Oklahoma City, OK 73112-4549

ATTORNEYS FOR PACIFIC GRINDING WHEEL CO., INC.

Nancy J. Siegel
Richards, Paul, Richards & Siegel
9 East 4th Street, Ste. 400
Tulsa, OK 74103-5118

ATTORNEYS FOR FEDERAL MOGUL CORPORATION

Bill Price
Hastie and Kirschner
3000 Oklahoma Tower
210 Park Avenue
Oklahoma City, OK 73102

ATTORNEYS FOR CHEM-TRONICS, INC. (INTERLAKE)

Mary Rose Alexander
Kevin Murphy
Lethan & Watkins
Sears Tower, Ste. 5800
Chicago, IL 60606

ATTORNEYS FOR CHEM-TRONICS, INC. (INTERLAKE)

Joe E. Edwards
Rodney J. Heggy
Day, Edwards, Federman, Propester & Christensen
2900 Oklahoma Tower
210 Park Avenue
Oklahoma City, OK 73102-5605

ATTORNEYS FOR METALLURGICAL TECHNOLOGIES, INC.

Patrick Donnelly
2601 Expressway, #601-W
Oklahoma City, OK 73112

ATTORNEYS FOR THUNDERBIRD SALES COMPANY

C. Victor Haley
Fairchild, Price, Thomas & Haley
1801 North Street
P O Drawer 631668
Nacogdoches, TX 75963-1668

ATTORNEYS FOR MCGEAN-ROHCO, INC., CEE BEE CHEMICAL, CEE BEE CHEMICALS, INC.

David J. Fisher
Travis P. Clardy
P 0 Drawer 1336
413 Shelbyville St
Center, TX 75935

ATTORNEYS FOR MCGEAN-ROHCO, INC., CEE BEE CHEMICAL, CEE BEE

B. J. Cooper
John F. Percival
William C. McAlister
Douglas A. Rice
Cooper & Percival
124 N.W. 10th
Oklahoma City, OK 73103

ATTORNEY FOR MET-L-CHEK COMPANY

W. Neil Rambin
Mark S. Scudder
Strasburger & Price
Suite 4300
901 Main St
Dallas, TX 75202

ATTORNEYS FOR L & F PRODUCTS, INC., THOMPSON & FORMBY, INC., MINWAX COMPANY, INC.

Michael F. Lauderdale
McAfee & Taft
10th Floor, 2 Leadership Square
Oklahoma City, Ok 73102

ATTORNEYS FOR L & F PRODUCTS, INC., THOMPSON & FORMBY, INC., MINWAX COMPANY, INC.

Murray E. Abowitz
Mort G. Welch
Abowitz, Welch & Rhodes
15 N. Robinson
Tenth Floor
P O Box 1937
Oklahoma City, OK 73101

ATTORNEYS FOR SPEEDCUT, INC., PLAZE, INC., BEL-RAY COMPANY, INC., POLYMERIC SYSTEMS, INC., PENETONE CORP.

Bradley A. Winters
J. Powell Carman
Thompson & Mitchell
1 Mercantile Center
Ste. 3300
St. Louis, MO 63101

ATTORNEYS FOR PLAZE, INC.

Harry Palmer
2728 N. W. 39th Expressway
P O Box 12908
Oklahoma City, OK 73157

ATTORNEYS FOR BEL-RAY COMPANY, INC.

Jill M. Habenicht
Fulbright & Jaworski
1301 McKinney, Ste. 5100
Houston, TX 77010-3095

ATTORNEYS FOR BREAK-FREE, INC.

Bill M. Roberts
Mills & Whitten
Ste. 500, One Leadership Sq.
211 N. Robinson
Oklahoma City, OK 73102

ATTORNEYS FOR CRAWFORD LABORATORIES, INC.,

Irwin F. Roth
4 Park Avenue, 9G
New York, NY 10016

ATTORNEYS FOR SOLVENT CHEMICAL COMPANY, INC.

Catherine McEnearney
Mobile Oil
3225 Gallows Road
Fairfax, VA 22037-0001

ATTORNEYS FOR MOBILE OIL

Stephen Peterson
Fenton, Fenton, Smith, Reneau & Moon
One Leadership Sq., Ste. 800
211 N. Robinson
Oklahoma City, OK 73102-7106

ATTORNEYS FOR GTE PRODUCTS CORP. AND NORTON COMPANY

Neal W. Bauer
Petersmarck, Callahan, Bauer & Barbour
One Kennedy Square, Ste. 1300
Detroit, MI 48226

ATTORNEYS FOR GTE PRODUCTS CORP. AND NORTON COMPANY

John T. Edwards
Monnet, Hayes, Bullis, Thompson & Edwards
1719 First National Center West
120 N. Robinson
Oklahoma City, OK 73102

ATTORNEYS FOR DESOTO, INC.

Vic Fields
102 Westlake Drive
Ste. 103
Austin, TX 78746

ATTORNEYS FOR DESOTO, INC.

Jeffrey K. Sherwood
Mark P. Fitzsimmons
Cheryl A. Falvey
Theodore C. Marcus
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W., Ste. 400
Washington, D.C. 20036

ATTORNEYS FOR GENERAL ELECTRIC

Drew Neville
LINN & NEVILLE
Bank of Oklahoma Plaza
Ste. 1200
201 Robert S. Kerr
Oklahoma City, OK 73102-4289

ATTORNEYS FOR GENERAL ELECTRIC

A.T. Elder, Jr.
Michael C. Stewart
Stewart & Elder, P.C.
1329 Classen Drive
Oklahoma City, OK 73101

ATTORNEYS FOR HAYNES INTERNATIONAL, INC.

Robert S. Baker
Baker, Baker & Tait
2140 Liberty Tower
100 N. Broadway
Oklahoma City, OK 73102

ATTORNEYS FOR MALLINCKRODT GROUP, INC., BRENT AMERICA, INC.,

G. David Ross
Lytle Soule & Curlee
1200 Robinson Renaissance
119 N. Robinson
Oklahoma City, OK 73102

ATTORNEYS FOR J.W. HARRIS CO., INC.

Robert L. Huckaby
Huckaby, Fleming, Frailey, Chaffin,
Cordell, Greenwood & Perryman
P O Box 533
Chickasha, OK 73023

ATTORNEYS FOR LOCTITE CORPORATION

Carl H. Langschmidt, Jr.
Cannon F. Allen
Armstrong Allen Prewitt Gentry
Johnston & Holmes
1900 One Commerce Square
Memphis, TN 38103-2568

ATTORNEYS FOR W.M. BARR & COMPANY

A. SCOTT JOHNSON & ASSOCIATES
Liberty Tower, Ste. 2750
100 N. Broadway
Oklahoma City, OK 73102

ATTORNEYS FOR W.M. BARR & COMPANY

Steven K. Mullins
Asst. U.S. Attorney
210 W. Park Avenue, Ste. 400
Oklahoma City, OK 73102

Timothy B. Walthall
U.S. Department of Justice
Ste. 8020S
1331 Pennsylvania Avenue, N.W.
P O Box 340
Washington, D.C. 20044

The Honorable Janet Reno
Attorney General of the U.S.
Dept. of Justice
Tenth & Constitution Avenue, N.W.
Rm 4400
Washington, D.C. 20530

ATTORNEYS FOR UNITED STATES OF AMERICA

Major Dawn E.B. Scholz
Attorney-Advisor
Environmental Law & Litigation Division
Air Force Legal Services Agency
AFLSA/JACE
1501 Wilson Blvd., Ste. 629
Arlington, VA 22209

/s/ Gary C. Bachman

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES E. AKIN, et al., Plaintiffs, vs. BIG THREE INDUSTRIES, INC., et al., Defendants.	)	No. CIV-94-832-C

MEMORANDUM OPINION

(Filed Dec. 13, 1996)

This matter is before the Court for consideration of a motion for summary judgment filed on behalf of defendants McGean-ROHCO, Inc. ("MR"), Dow Chemical Company ("Dow"), and Ashland Chemical Company ("Ashland") in which defendant Thunderbird Sales Company joins. These four defendants will be referred to collectively as "movants". After plaintiffs responded, movants filed a reply on September 3, 1996.

Plaintiffs, employed by the Air Force at Tinker Air Force Base ("TAFB") in aircraft maintenance positions in the Chemical Cleaning Unit ("CCU") located in Building 3001, contend that they have central and peripheral nervous system and other specified disorders as a result of exposure through inhalation and dermal absorption of certain substances contained in products manufactured or supplied by movants. They claim they are at risk to develop kidney cancer in the future as a result of their exposure, and also claim they are at risk to develop other illnesses such as renal cancer, neurological dysfunction,

and collagen vascular disease from exposure to various chlorinated hydrocarbons while employed in Building 3001 at TAFB.

The basis of the motion is that because the Air Force, the actual purchaser of the chemicals, knew or should have known the risks associated with exposure, movants had no duty to warn either the Air Force or its employees. Movants have supplied a lengthy, detailed and well-supported list of undisputed facts which have not been controverted by plaintiffs. Accordingly, the Court finds those facts listed by movants to be the material undisputed facts, summarizing them here only briefly. At least since 1980, chemicals manufactured and supplied to TAFB and used for cleaning aircraft engine parts have complied with the specifications established either by the Department of Defense ("DOD") or by TAFB, and have been tested and approved by the engine manufacturers and TAFB personnel. A material safety data sheet ("MSDS") was supplied for each of the products in question. Starting in 1980, MR provided training to CCU personnel in the use of MR products, including information on the proper uses of the products and precautions to take against potential adverse affects of exposure. Process engineers responsible for the CCU specified the cleaning processes for each type of part, including any information available about the potential hazards of chemical used in the process, as well as safety equipment employees should use. TAFB has an organization called Bioenvironmental Engineering ("BEE") which includes active duty officer bioenvironmental engineers, civilian

industrial hygienists, and active duty enlisted bioenvironmental technicians. The Air Force has had, by regulation for standard, an Occupational Health Program ("OHP") for as long as the movants have sold products for use at TAFB. This program allows for uniform recording of work place and worker exposure date. The OHP requires the BEE organization to perform periodic industrial hygiene surveys of all work places at TAFB, to determine whether or not exposures pose a potential health risk. The surveys consist of three phases – recognition, evaluation, and control – and cover both workers and workplaces. The "permissible exposure limits" ("PELs") for airborne substances are set by the Occupational Safety and Health Administration ("OSHA"). PELs represent conditions under which it is believed nearly all workers can be repeatedly exposed day after day without adverse effect. The ACGIH is a non-profit professional organization whose members are from governmental and educational institutions involved in occupational safety and health. The ACGIH establishes the threshold limit value ("TLV"). For a TLV, the time weighted average is expressed in parts or substance per million parts of air. If the OSHA PEL and the ACGIH TLV are different for a particular substance, the Air Force, by regulation, adopts the most stringent exposure standard. TAFB BEE personnel are, and have been since their employment well aware that cleaning solvents used in Building 3001 are potentially harmful to humans and that the use of solvents at TAFB has decreased over time. This is in part because the TLVs have been lowered and in part because the Air Force opted for less toxic material so engineering controls

and/or personal protective equipment could be eliminated.

Movants have no duty to warn if they had reason to expect that the user of their products, TAFB, either knew of the danger of the products or would discover the hazards associated with a product's use. *Duane v. Oklahoma Gas & Electric Company*, 833 P.2d 284, 286 (Okla. 1992). Plaintiffs seek to enlarge this duty and argue movants' duty to warn should include a warning of the specific hazard which caused plaintiffs' injuries. Plaintiffs believe the specific hazard is exposure to low levels of toxic solvents and attack movants for their failure "to even address the issue of whether plaintiffs can present probative controverting evidence." Plaintiffs' Response Brief at 5 (July 31, 1996). However, this does not recognize the appropriate requirements in responding to a motion for summary judgment.

A party resisting a motion for summary judgment must do more than make conclusionary allegations, he "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Dart Industries, Inc. v. Plaunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 498 (10th Cir. 1983); *see Lake Hefner Open space Alliance v. Dole*, 871 F.2d 943, 946 (10th Cir. 1989) (plaintiff did not "by affidavits or . . . otherwise . . . set forth *specific* facts showing that there is a genuine issue for trial." (emphasis supplied)). The burden on the moving party is only to point out that the records do not disclose a genuine issue on any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v.*

Zenith Radio Corp., 475 U.S. 574, 586 (1986), 475 U.S. at 586. The non-moving party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Plaintiffs rely on the affidavit of Alan Hirsch, M.D., as support for their claim that exposure to low concentrations results in damage to the central and peripheral nervous systems. Plaintiffs follow a reverse approach in resisting summary judgment; that is, plaintiffs argue movants, while providing evidence that the Air Force knew of the general hazards associated with solvents at levels above the PELs and TLVs, failed to "present any logical justification for assuming the Air Force would also know of the different hazard presented at lower concentrations." Plaintiffs' Brief at 8 (July 31, 1996). The argument makes no sense. Whether at low levels or high, the Air Force knew the dangers, and thus movants had no duty to warn. The focus in this controversy must remain on the knowledge of TAFB, the purchaser/user. *See Duane*, 833 P.2d at 286-87 (Okla. 1992) ("Where the danger or potentiality of danger is known or should be known to the user, the duty to warn does not attach. *Mayberry v. Akron Rubber Mach. Corp.*, [483 F.Supp. 407 (N.D. Okla. 1979)] at p. 413, and cases cited therein."). Movants have provided an overwhelming amount of evidence clearly establishing TAFB was a knowledgeable, sophisticated purchaser which not only should have but did, in fact, know of the hazards, both general and specific, about which plaintiffs' complain. Accordingly, the motion will be granted.

IT IS THEREFORE ORDERED that the motion for summary judgment filed on behalf of defendants

McGean-ROHCO, Inc., Dow Chemical Company, and Ashland Chemical Company, and joined in by Thunderbird Sales Company is GRANTED. A judgment shall enter accordingly. Unless any party notifies the Court of further pending claims/defendants/motions by December 27, 1996, the clerk will be instructed that all claims and defendants are now terminated and the case will be closed.

IT IS SO ORDERED this 13 day of December, 1996.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE
ENTERED IN JUDGMENT
DOCKET ON 12-13-96

IN THE UNITED STATES COURT OF APPEALS
FOR THE TETNH CIRCUIT

JAMES E. AKIN, et al., Plaintiffs, vs. BIG THREE INDUSTRIES, et al. Defendants	)	No. 97-6030

On Appeal from the United States District Court
For The Western District of Oklahoma

The Honorable Robin J. Cauthron

No. CIV-94-832-C

BRIEF OF APPELLANTS

JAMES A. IKARD
211 N. Robinson, Suite 600
Oklahoma City, OK 73102

E. Hart Green
Mitchell A. Toups
WELLER, GREEN, MCGOWN & TOUPS, L.L.P.
P.O. Box 350
Beaumont, TX 77074

Shari A. Wright
Robert J. Binstock
REICH & BINSTOCK
4265 San Felipe, Suite 1000
Houston, TX 77027

Attorneys for Appellants

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* * *

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. District Court Jurisdiction Denied

Plaintiffs deny that the District Courts in the Eastern District of Texas or the transferee Western District of Oklahoma had proper jurisdiction because removal of the case from state court in Texas was untimely, the removing defendant General Electric Company ("GE") failed to obtain its co-defendants' unanimous consent to removal, and none of the other defendants were entitled to join in the removal and be considered by the court in ruling on plaintiffs' Motion to Remand, and therefore, the District Court for the Eastern District of Texas should have sustained plaintiffs' timely Motion to Remand. Plaintiffs request this Court remand the case to the 60th Judicial District Court of Jefferson County, Texas.

B. Appellate Jurisdiction

This court has appellate jurisdiction under 28 U.S.C. § 1291 and Rule 4(a), Fed.R.App.P. All named plaintiffs filed their Notice of Appeal on January 10, 1997, appealing from an order of the District Court of the Western District of Oklahoma of December 13, 1996, which disposed of all remaining claims against all remaining defendants. In the same Notice of Appeal all named plaintiffs have also appealed from an order overruling plaintiffs' Motion to Remand issued by the District Court of the Eastern District of Texas on March 21, 1994.[1] (Docket Sheet entries at Appendix, hereafter "App." 527-530.

ISSUES PRESENTED FOR APPEAL

This appeal presents two separate, distinct issues:

1. Did GE fail to comply with the procedures required for proper removal of this case and did the court therefore commit reversible error in denying plaintiff's Motion to Remand?

a. Was GE's removal from state court untimely because the initial pleading sufficiently communicated to

---

[1] All of the defendants except the four appelllees have been dismissed from the case either by settlement or plaintiffs' motion granted by the Oklahoma court, including all of the defendants that were present when the case was removed. Because improper removal would vitiate the Oklahoma court sustaining appellees' Motion for Summary Judgment, the removal issues are properly the subject of this appeal with these appellees.

GE the removability of the case under either federal enclave or federal officer jurisdiction?

b. Coupled with specific knowledge concerning the repair and maintenance activities performed at Tinker Air Force Base ("TAFB") by the plaintiffs on its jet engines used by the air Force ("AF"), did the initial pleading sufficiently communicate to GE the removability of the case under either federal enclave or federal officer jurisdiction?

c. Since GE's removal was untimely, in denying plaintiffs' Motion to Remand did the court err by considering GE's co-defendants who "joined" in GE's removal?

d. If the removal was timely, did GE nevertheless fail to obtain the required unanimous consent of its co-defendants because one defendant had previously interposed a defense and actively invoked the jurisdiction of the state court and was therefore unable to consent to and/or join in removal?

2. Did the court commit reversible error in sustaining the Motion for Summary Judgment of the defendants/appellees McGean-Rohco, Inc., Thunderbird Sales Company, Ashland Chemical Company, and Dow Chemical Company?

A novel issue is whether manufacturers' denials that a risk or danger from its products exist (i.e. low-level, chronic exposure causes neurological injury to occupationally exposed workers) permit them to nevertheless interpose a "sophisticated purchaser" defense. In its briefs below (Brief in Support of Motion for Summary Judgment and Brief in Reply to Plaintiffs' Response) the

defendants take a perplexing position: while denying that a danger exists from low-level chronic exposure (justifying not including it in their MSDSs and labels), they assert that it need not have warned the AF because the AF should have nevertheless known from its own studies and the available literature and publications that this very risk *did* exist. (i.e. the purchaser should have known more about the dangers of the product than the manufacturer did – and about a danger that the manufacturer rejects).

More fundamentally, can the AF be a "sophisticated purchaser" of these solvents for this specific risk and is the AF's status a factual determination which, if disputed, precludes summary judgment? Finally, because the labels on 55 gallon drums reached the plaintiffs directly, under these facts does the sophisticated purchaser rule apply at all? In short, do sufficient material facts remain in dispute and do the applicable legal principles

* * *

impeded the AF's ability to discover the hazard at issue.

It is the plaintiffs' contention that this evidence precludes summary judgment and that the Court should, if and only if it does not remand the case to state court and vacate Summary Judgment, reverse Summary Judgment and remand the case for trial.

SUMMARY OF ARGUMENT

In this appeal the plaintiffs are challenging the decisions of two courts in separate, but necessarily interconnected matters: if removal to the Texas district court was improper then the Oklahoma district court had no jurisdiction to enter summary judgment for the remaining defendants. Even if removal was timely, the Oklahoma court erred in sustaining summary judgment for the solvent manufacturers. Finally, if the court remands this case to the Texas state court, none of the remaining defendants may remove it anew.

1. Removal Flawed

The removal process utilized by GE was fatally flawed and the case should have been remanded to state court. GE failed to remove the case from state court within 30 days of receipt of the original petition, the initial pleading having affirmatively revealed on its face grounds for removal existed under either/both of GE's asserted grounds for federal jurisdiction: federal enclave and federal officer. That the Petition can be (and was) so read by GE, is also supported by the phrasing of the interrogatories served on the plaintiffs which referred repeatedly to "materials you worked with or around at Tinker air Force Base".

Also, the filing of a Motion for Summary Judgment in state court by GE's co-defendant on the identical government contractor defense asserted by GE establishes that the Petition reasonably alerted GE to its removability. Moreover, GE's specific knowledge of GE's activities generally described in the Petition as set forth in the GE

affidavit constituted sufficient knowledge to mandate action to remove the case.

While appellants assert that the Petition was crystal clear on its removability, even if GE was legitimately unable to ascertain the removability of *both* bases of jurisdiction from the Petition, if a federal officer claim is joined with other nonremovable claims, the case was removable. Therefore, for example, if GE could ascertain from the Petition that federal officer jurisdiction existed, but it was unable to discern if federal enclave jurisdiction did (or *vice versa*), then GE was required to remove the entire case within thirty days of receipt of the Petition. Because GE failed to timely remove the *entire* case the court should remand it.

Additionally, because GE was able to remove within the 30-day removal period and failed to do so, none of the other defendants could consent or join in GE's removal, barred by the "single-date-of-removal rule".

A final fatal flaw in GE's removal was its inability to procure the required unanimous consent of its co-defendants since one had already invoked the jurisdiction of the court in filing a Motion for Summary Judgment.

2. Summary Judgment Barred

* * *

and were exposed to significant amounts of chemicals.

[Defendants were] . . . negligent in the manner in which they failed to properly test said chemicals before placing them in the hands of Tinker Air Force Base . . . and in failing to warn and instruct the individuals working at Tinker Air Force Base . . . of the proper way to cope . . . protect one's body against . . . and means of preventing health effect caused by those chemicals and working around the chemicals.

. . . Defendants were aware of the latent defects . . . in the jet engines to be used by workers at Tinker Air Force Base without adequate warnings or precautions . . . (emphasis added, App. 6-7, 10).[9]

As to these allegations, the Texas court, instead of placing the burden on GE and resolving all doubts against removal, etc., etc., allowed GE to merely claim that this language caused it to "speculate" as to whether any of the alleged exposures connected to work on its jet engines may have occurred *off* TAFB. The Petition does more than not "preclude removability", it affirmatively

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[9] As to the court's observation that the Petition's language could be a "geographical modifier, referring to the location of the exposures" (App. 296), for GE, the "geographical modifier" necessarily alerted it to the existence of a ground for removal, notwithstanding any alleged doubts about federal officer jurisdiction and it must remove within thirty days of December 28, 1992, or waive its right to remove.

established that federal enclave jurisdiction was "readily ascertainable." This court should give effect to the strong policies against removal, and determine that GE was adequately informed as to this basis for removal.

2. *Federal Officer Jurisdiction*: GE claimed that a basis of federal jurisdiction separate from federal enclave was federal officer jurisdiction provided by 28 U.S.C. § 1442(a)(1) and that it could assert a colorable claim to the three elements

* * *

of law bar judgment for defendants. The Court should remand this case for trial.

Respectfully submitted,

/s/ James A. Ikard
JAMES A. IKARD
211 N. Robinson, Suite 600
Oklahoma City, OK 73102

E. Hart Green
Mitchell A. Toups
WELLER, GREEN, MCGOWN & TOUPS, L.L.P.
P.O. Box 350
Beaumont, TX 77074

Shari A. Wright
Robert J. Binstock
REICH & BINSTOCK
4265 San Felipe, Suite 1000
Houston, TX 77027

Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Appellants' Brief was mailed postage paid in the U.S. Mail on the 28th day of April, 1997, to:

Mort G. Welch
2601 N.W. Expressway
601 Oil Center West
Oklahoma City, Oklahoma 73112

Clyde A. Muchmore
Harvey D. Ellis
Kelley C. Callahan
Crowe & Dunlevy
20 North Broadway
Oklahoma City, OK 73102

/s/ James A. Ikard
James A. Ikard

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